1946

THE

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AND DECISIONS OF THE

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Supreme Court of Judicature (Consolidation) (15 & 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*a*). Rex *v.* Justices of the Appeals Committee of the County of London Quarter Sessions - - **C. A. 176**

Workmen's Compensation (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1. Wilson *v.* Chatterton M - **C. A. 360**

—— —— *s.* 29, *sub-s.* 1. Leathley *v.* John Fowler & Co., Ld. **C. A. 579**

1925-1940.

Rating and Valuation (15 & 16 *Geo.* 5, *c.* 90), *ss.* 19, 37; *Rating and Valuation (Postponement of Valuations)* (1 & 2 *Geo.* 6, *c.* 19), *s.* 1; (3 & 4 *Geo.* 6, *c.* 40), *s.* 11, *sub-s.* 3. Pratt *v.* North-West Norfolk Assessment Committee - - **C. A. 93**

1927.

Moneylenders (17 & 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-s.* 2. Kent Trust, Ld. *v.* Cohen - - - **C. A. 584**

1929.

Local Government (19 & 20 *Geo.* 5, *c.* 17), *s.* 72. Bomford *v.* South Worcestershire Assessment Committee **Divl. Ct. 442**

1930.

Railways (Valuation for Rating) (20 & 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3. In the Matter of London & North Eastern Ry. Co. (Canteens) **Ry. and C. Com. 13**

—— —— London & North Eastern Ry. Co. *v.* Railway Assessment Authority **Ry. and C. Com. 27**

Road Traffic (20 & 21 *Geo.* 5, *c.* 43), *s.* 3, *sub-s.* 1; *s.* 113, *sub-s.* 1. Badham *v.* Lambs, Ld. **du Parcq L.J. 45**

—— —— *s.* 11, *sub-s.* 1; *s.* 121. Wallace *v.* Major - - - **Divl. Ct. 473**

1932-1943.

Town and Country Planning (22 & 23 *Geo.* 5, *c.* 48), *s.* 47; *(Interim Development)* (6 & 7 *Geo.* 6, *c.* 29) *s.* 5. Mills & Rockleys, Ld. *v.* Leicester City Council **Divl. Ct. 315**

1933.

Administration of Justice (Miscellaneous Provisions) (23 & 24 *Geo.* 5, *c.* 36), *s.* 2, *sub-s.* 2 (i.). Rex *v.* Morry **C. C. A. 153**

Local Government (23 & 24 *Geo.* 5, *c.* 51), *sch. II.*, *par.* 5 (1). Watson and Others *v.* Ayton **Hallett J. 297**

Rent and Mortgage Interest Restrictions (Amendment) (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*a*); *sch. I.* (*g*). Benninga (Mitcham), Limited *v.* Bijstra - - - - **C. A. 58**

—— —— *s.* 3, *sub-s.* 1 (*a*); *sch. I.*, *para.* 1 (*g*) (i.). Bolsover Colliery Co. *v.* Abbott - - - **C. A. 8**

—— —— *s.* 3, *sub-s.* 3. Sheehan *v.* Cutler **C. A. 339**

Rent and Mortgage Interest Restrictions (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1. Palser *v.* Grinling **C. A. 631**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

COOPER *v.* NATIONAL PROVINCIAL BANK, LIMITED.

1945
July 19, 20, 23, 24.

Lawrence L.J.

Principal and surety—Guarantee of bank account—Duty of disclosure by bank—Criterion—Authority by wife to husband to draw on her account—Husband an undischarged bankrupt—Cheques stopped by orders not to pay.

A wife gave her husband, who was an undischarged bankrupt, authority to draw on her account at a branch of the defendant bank. About a dozen cheques drawn on the account, most of them by the wife before she gave her husband the authority, were not met, on presentation, because of orders by the drawer not to pay. Subsequently the plaintiff, as surety, signed two guarantees of the wife's account. The bank did not disclose to the plaintiff before he signed the guarantees that the husband had power to draw on the account, that he was an undischarged bankrupt, or that cheques had been drawn on the account and then not paid on the instructions of the drawer:—

Held, that the bank were under no duty, voluntarily, to disclose these facts before the plaintiff signed the guarantees. Applying Lord Campbell's criterion, whether there was a contract between the customer and the bank that her position should be different from that which the surety might naturally expect, there was

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nothing so unusual in the way in which the account had been operated or in a wife giving to her husband authority to draw on her account or in the fact that he was an undischarged bankrupt that it might not have been reasonably anticipated by the surety.

Semble, secus, if it were shown that the account was not in reality that of the wife, but was the husband's and the bank knew this.

Hamilton v. *Watson* (1845) 12 Cl. & F. 109 applied.

ACTION tried by Lawrence L.J. sitting as an additional judge of the King's Bench Division.

Mrs. June Phyllis Maud Rolfs, who had property of her own, had an account at the Lancaster Gate branch of the defendant bank. Her husband, Lionel Malcolm Rolfs, had been made bankrupt on May 17, 1935, and remained undischarged in September, 1942. The plaintiff, Victor Henry Cooper, had an account at the Southall branch of the defendant bank. In May, 1942, Mrs. Rolfs opened a second account at the Lancaster Gate branch in the name of, "The Vale Farms Co.: June Phyllis "Maud Rolfs." Mr. Rolfs, having told the plaintiff of a proposition to purchase certain farms to be managed by him, obtained from the plaintiff 500*l.* in June, 350*l.* in July, and 60*l.* in August, 1942, advances for the farm venture on certain terms and undertakings given by Mr. Rolfs, and these sums were paid into the Vale Farms Co. account. The plaintiff was informed that one of the farms purchased was to be vested in Mr. and Mrs. Rolfs. On July 23, 1942, Mrs. Rolfs gave Mr. Rolfs a written authority to draw on the Vale Farms Co. account and gave him other powers of managing the farming venture. About a dozen cheques drawn on the Vale Farms Co. account had not been met on presentation, because of orders by the drawer not to pay—nearly all of them drawn by Mrs. Rolfs before July 23, 1942. Those after that date were drawn by Mr. Rolfs. On September 25, 1942, the plaintiff signed a guarantee of the account of "June Phyllis Maud "Rolfs, wife of Lionel Malcolm Rolfs, trading as Vale Farms "Co.," thus described in the guarantee, for 650*l.* On September 28, 1942, the plaintiff signed another guarantee of the same account for 600*l.* Before he signed the guarantees, the manager of the branch of the defendant bank told the plaintiff that the Vale Farms Co. account had been overdrawn some hundred pounds for some time.

The plaintiff brought the present action against the bank, claiming that the two guarantees of September 25 and 28, 1942,

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be declared void and set aside on the ground that the defendant bank, before they were signed, failed to disclose to the plaintiff (1.) that Mr. Rolfs had power to draw on the Vale Farms Co.'s account; (2.) that at all material times Mr. Rolfs was an undischarged bankrupt; and (3.) that the account had been operated on by cheques drawn thereon but not paid on presentation because of instructions by the drawer not to pay them. The defendant bank maintained that there was no obligation on them to make these disclosures and they counter-claimed for the amount due on the two guarantees, which, with interest, amounted to 1,386*l.* 5*s.* 11*d.* At the hearing the plaintiff in his evidence stated that all his dealings had been with Mr. Rolfs and that when he signed the first guarantee he did so without noticing that it was not a guarantee of Mr. Rolf's account.

Roxburgh K.C. and *P. B. Morle* for the defendant bank. There is no suggestion on the pleadings that the account was that of Mr. Rolfs and the plaintiff is estopped from saying so by the terms of the guarantees which he signed. As Blackburn J. said in *Smith* v. *Hughes* (1): "The rule of law is that "stated in *Freeman* v. *Cooke* (2). If, whatever a man's real "intention may be, he so conducts himself that a reasonable "man would believe that he was assenting to the terms "proposed by the other party, and that other party, upon that "belief enters into the contract with him, the man thus "conducting himself would be equally bound as if he had "intended to agree to the other party's terms." The account was expressed in the guarantee to be that of Mrs. Rolfs and the credit guaranteed was that of Mrs. Rolfs.

The bank were under no obligation to disclose to the plaintiff, before he signed the two guarantees, that Mr. Rolfs had power to draw on the account of "June Phyllis Maud Rolfs, wife of "Lionel Malcolm Rolfs, trading as Vale Farms Co.," as it was described in the guarantees, or that Mr. Rolfs was an undischarged bankrupt, or the way in which the account had been kept. In *London General Omnibus Co., Ld.* v. *Holloway* (3), both Farwell L.J. and Kennedy L.J. referred to the distinction between suretyship for the fidelity of a servant and a guaranty in respect of a banking account (4) and referred to Lord Campbell's speech in *Hamilton* v. *Watson* (5). See

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(1) (1871) L.R. Q. B. 597, 607.

(2) (1848) 2 Ex. 654, 663.

(3) [1912] 2 K. B. 72.

(4) Ibid. 82 and 85.

(5) (1845) 12 Cl. & F. 109, 118.

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also *Wythes* v. *Labouchere* per Lord Chelmsford, L.C. (1) and *National Provincial Bank of England, Ld.* v. *Glanusk* (2).

Sellers K.C. and *Vernon Gattie* for the plaintiff. On all the facts here proved there was a duty on the bank to disclose to the intended surety the fact that Mr. Rolfs had power to draw on this account and that Mr. Rolfs was an undischarged bankrupt and also the facts as to the cheques drawn on the account, which the bank were ordered not to pay. [Lawrence L.J.: If the Vale Farms Co.'s account was Mr. Rolfs' account and the bank knew that, there might have been a duty to disclose that he was an undischarged bankrupt; but those were not the facts since the credit was given to Mrs. Rolfs.] The concealment was of a material part of the transaction itself between the creditor—the bank—and the debtor, to which the suretyship related, within the meaning of the words of Lord Chelmsford L.C. in *Wythes* v. *Labouchere* (1). The criterion, according to Lord Campbell in *Hamilton* v. *Watson* (3) is " whether the disclosure ought to be made voluntarily, " namely, whether there is anything that might not naturally " be expected to take place between the parties who are " concerned in the transaction, that is, whether there be a " contract between the debtor and the creditor, to the effect " that his position shall be different from that which the surety " might naturally expect." The surety would not expect that a bankrupt husband would have the power to empty this account. In *Trade Indemnity Co., Ld.* v. *Workington Harbour and Dock Board* (4) Lord Atkin said: " There may be a question " whether in the formation of a contract of guarantee there is " an obligation on the promisee to make a disclosure of material " facts which would not exist in the formation of an ordinary " contract. . . . . But it is clear that in whatever way " any duty to disclose arises and whether the promisee is under " a positive duty to disclose material facts, which is one view, " or is supposed to represent that the transaction sought to be " guaranteed has no unusual or abnormal characteristics, " making him the author of a misrepresentation innocent or " fraudulent as the case may be, which is another view, the " duty or the implied representation will depend upon the " particular circumstances of each transaction." Here, undoubtedly, the transaction had unusual and abnormal characteristics and, on either view, there was a duty voluntarily to disclose the facts. Lord Cranworth in *Owen and Gutch* v. *Homan* (1) said: " Without saying that in every case a " creditor is bound to inquire under what circumstances his " debtor had obtained the concurrence of a surety, it may " safely be stated that if the dealings are such as fairly to lead " a reasonable man to believe that fraud must have been used " in order to obtain such concurrence, he is bound to make " inquiry, and cannot shelter himself under the plea that he was " not called on to ask, and did not ask, any questions on the " subject." [LAWRENCE L.J. Fraud in obtaining the concurrence of the surety has not been suggested here.] See also *Jean MacKenzie* v. *Royal Bank of Canada* (2).

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(1) (1858) 3 De G. & J. 593, 609

(2) [1913] 3 K. B. 335.

(3) 12 Cl. & F. 119.

(4) [1937] A. C. 17.

LAWRENCE L.J. The plaintiff's statement that he signed the first guarantee without noticing that it was not a guarantee of Mr. Rolfs's account, is to my mind incredible. Counsel for the plaintiff drew my attention to the fact that the undertakings given to the plaintiff for his loans were given in the name of Mr. Rolfs, but one of the undertakings indicated that the farm estate was to be vested in Mr. and Mrs. Rolfs and that cheques were drawn by the husband; but by the time the guarantees were given it must have been obvious to the plaintiff that he was not being asked to guarantee an account of the husband, which never existed, but that he was being asked to guarantee the account of the wife trading as the Vale Farms Co.

Of the authorities which have been cited the most in point was *London General Omnibus Co., Ld.* v. *Holloway* (3) a case of a fidelity guarantee, since there the authorities on bank guarantees were fully reviewed. Farwell L.J. in that case referred to Lord Campbell's speech in *Hamilton* v. *Watson* (4) which has been cited in all the cases on bank guarantees with approval and so far as I know, has never been criticized.

Lord Campbell said: " Your Lordships must particularly " notice what the nature of the contract is. It is suretyship " upon a cash account. Now the question is, what, upon " entering into such a contract, ought to be disclosed? and I " will venture to say, if your Lordships were to adopt the " principles laid down and contended for by the appellant's " counsel here, that you would entirely knock up those

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(1) (1853) 4 H. L. C. 997, 1034.

(2) [1934] A. C. 468.

(3) [1922] 1 K. B. 72.

(4) 12 Cl. & F. 119.

"transactions in Scotland of giving security upon a cash "account, because no bankers would rest satisfied that they "had a security for the advance they made, if, as it is contended, "it is essentially necessary that everything should be disclosed "by the creditor that is material for the surety to know. "If such was the rule, it would be indispensably necessary for "the bankers to whom the security is to be given, to state how "the account has been kept: whether the debtor was in the "habit of overdrawing; whether he was punctual in his "dealings; whether he performed his promises in an honourable "manner;—for all these things are extremely material for the "surety to know. But unless questions be particularly put "by the surety to gain this information, I hold that it is quite "unnecessary for the creditor, to whom the suretyship is to "be given, to make any such disclosure; and I should think "that this might be considered as the criterion whether the "disclosure ought to be made voluntarily, namely, whether "there is anything that might not naturally be expected to "take place between the parties who are concerned in the "transaction, that is, whether there be a contract between "the debtor and the creditor, to the effect that his position "shall be different from that which the surety might naturally "expect; and, if so, the surety is to see whether that is "disclosed to him. But if there be nothing which might not "naturally take place between these parties, then, if the "surety would guard against particular perils, he must put "the question, and he must gain the information which he "requires."

The submissions for the plaintiff seem to me to be diametrically opposed to what was there said by Lord Campbell. If, said Lord Campbell, the rule was that everything should be disclosed that was material for the surety to know, it would be necessary for the bankers to state how the account had been kept, whether the debtor was in the habit of overdrawing, whether he was punctual in his dealings; whether he performed his promises in an honourable manner. Lord Campbell held that it was unnecessary for the bank to make these disclosures. As to whether the debtor was in the habit of overdrawing, the plaintiff admitted that the manager of this branch of the defendant bank, told him that the account had been overdrawn some hundred pounds for some time. The other issues stated by Lord Campbell were directed to the way in which the account had been operated. To state whether the debtor, the customer of the bank, was punctual in his dealings and whether he performed his promises in an honourable manner would cover a statement about these cheques which had been drawn and delivered but which the debtor had ordered the bank not to pay. Lord Campbell puts the criterion as to whether there should be a voluntary disclosure as being whether there is a contract between the debtor and the creditor, that is, between the customer and the bank, to the effect that her position shall be different from that which the surety might naturally expect. It does not seem to me that there was here any contract between Mrs. Rolfs and the bank which made the position between them one which the surety, the plaintiff, would not naturally expect. There is nothing unusual in a wife giving to her husband authority to draw on her account. Moreover, that authority was not a matter of contract between the bank and herself: it was a unilateral authority given by her to her husband. The fact that her husband to whom she gave this authority to draw on her account was an undischarged bankrupt does not make the authority so unusual that it ought to have been communicated by the bank to the intended surety. If it could have been said that the account, which was to be guaranteed, was not really the account of Mrs. Rolfs, but was, in truth, the account of Mr. Rolfs, an undischarged bankrupt, and the bank then took a guarantee from a surety of the nominal account of Mrs. Rolfs, it might be, possibly, that the bank aware of those facts, ought first to have disclosed them. But the bank neither knew that this was so, nor had any reason to think so. Not only was the fact that the Vale Farms Co. account was really an account of Mr. Rolfs not proved in evidence before me, but the facts which were proved before me all tended to show that the account, although it was operated on by Mr. Rolfs and although the scheme of the farming venture for which the account was used was that Mr. Rolfs should manage the farms, was Mrs. Rolfs', and that the funds to be used for the purchase of the farms were those of Mrs. Rolfs in so far as they were not the funds of the bank.

Mrs. Rolfs account was overdrawn and she had authorized her husband, who was an undischarged bankrupt, to draw on the account. Further, a number of cheques had been drawn on this account, yet orders had been given by the drawer not to pay them. But, in my opinion, there was no duty on the bank to disclose any of these facts, since there was nothing in

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the contract between the bank and their customer, Mrs. Rolfs which was unusual or which might not reasonably have been anticipated by the plaintiff, the surety. The fact that the account was overdrawn was disclosed. The orders given by the drawer of the cheques to the bank not to pay them were merely the method of operation of the account by the debtor and the authority given by a wife to her husband to draw on her account is, in my opinion, not unusual, even where he is an undischarged bankrupt. It was not Mr. Rolfs' credit which was being guaranteed, it was his wife's, and the facts known to the bank did not show that the account was, in reality, that of Mr. Rolfs, nor did the facts proved in evidence show this.

For these reasons I hold that the defendant bank was under no duty to make these disclosures before the guarantees were signed and the plaintiff's action must be dismissed. There will be judgment for the defendant bank on the counterclaim for the sum of 1,386*l*. 5*s*. 11*d*.

Solicitors for plaintiff: *Gulliver & Burrow*.
Solicitors for defendant bank: *Wild, Sapte & Co.*

C. G. M.

pplied. LEWIS *v.* EEVES [1952] 1 K.B. 19

Principle stated by SCOTT, L.J., at p. 12, *applied.* AMERICAN ECONOMIC LAUNDRY, LTD. *v.* LITTLE. [1950] 2 All E.R. 1186.

Applied. AMERICAN ECONOMIC LAUNDRY LD. *v.* LITTLE [1951] 1 K. B. 400

C. A.

1945

July 11.

Scott, MacKinnon and Lawrence L.JJ.

BOLSOVER COLLIERY COMPANY, LIMITED *v.* ABBOTT.

Landlord and tenant—Rent restriction—Dwelling-house—Contractual and statutory tenant employed by landlord—Death of tenant—Succession to tenancy by son—Not in employment of landlord—Possession required by landlord for occupation by employee—Son's tenancy subject to defeasance—Landlord's right to possession—Increase of Rent and Mortgage Interest (*Restrictions*) *Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)—*Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*a*), *first sch., para.* 1 (*g*), (*i*).

The defendant, pursuant to s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage (Restriction) Act, 1920, succeeded to the tenancy of a dwelling house on the death of his father with whom he had resided. The father had entered the employment of the plaintiffs, the landlords of the house, about 1920, and the house was then let to him in consequence of his employment. In 1921 he became statutory tenant, and continued in his employment with the plaintiffs until his death in 1941. The defendant was never in the employment of the plaintiffs, but continued to occupy the house. In 1945 the plaintiffs required the house for the occupation of a person in their whole-time employment, but the defendant declined to give up possession and the plaintiffs' claim to recover possession was dismissed by the county court judge :—

Held, that the father's tenancy was subject to defeasance by the plaintiffs on his ceasing to be in their employment by virtue of the provisions of para. *g* (i.) of the Rent and Mortgage Restriction (Amendment) Act, 1933, that when the defendant succeeded to that tenancy, it remained subject to the same defeasance and therefore the plaintiffs having established that they required the house for occupation by a person in their whole-time employment, were entitled to an order for possession.

APPEAL from Chesterfield county court.

The plaintiffs, the Bolsover Colliery Co., Ld., brought an action against the defendant, Abbott, to recover possession of a dwelling-house which was subject to the Rent Restrictions Acts and which was required by them for occupation by one of their workmen. They claimed to be entitled to recover possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1 (*a*), and the first sch. thereto (1). The defendant's father had entered the plaintiffs' employment some twenty-five years ago, and in consequence of that employment the plaintiffs let the house to him. In 1921 the plaintiffs gave notice of increase of rent to the father who then became a statutory tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The father died in 1941 while still in occupation of the house, and in the employment of the plaintiffs. The defendant, who was at that time residing with his father, continued in occupation, but was never in the employment of the plaintiffs. He refused to give up possession when required by the plaintiffs to do so, and this action was therefore brought by them. The county court judge refused to make an order for possession, and the plaintiffs appealed.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 : " For the " purposes of this Act, except " where the context otherwise " requires . . . . (*g*) the expression " ' tenant ' includes the widow of " a tenant dying intestate who " was residing with him at the " time of his death, or, where a " tenant dying intestate leaves no " widow or is a woman, such " member of the tenant's family " so residing as aforesaid as may " be decided in default of agree- " ment by the county court."

The words " dying intestate " were repealed by the Increase of Rent and Mortgage (Restrictions) Act, 1935.

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1 : " No order or " judgment for the recovery of " possession of any dwelling-house " to which the principal Acts " apply . . . . shall be made . . . . " unless the court considers it " reasonable to make such an " order . . . . and either —

" (*a*) the court has power so to " do under the provisions set out " in the First Schedule to this " Act ; . . . ."

First Schedule : " A court shall " for the purposes of s. 3 of this " Act, have power to make or give " an order or judgment for the " recovery of possession of any " dwelling-house to which the " principal Acts apply . . . . " without proof of suitable alterna- " tive accommodation (where the " court considers it reasonable " so to do) if (*g*) the dwelling- " house is reasonably required for " occupation as a residence for " some person engaged in his " whole-time employment or in " the whole-time employment of " some tenant from him . . . . " and either (i.) the tenant was in " the employment of the landlord " . . . . and the dwelling-house " was let to him in consequence of " that employment and he has " ceased to be in that employ- " ment."

Safford for the plaintiffs. The learned county court judge was wrong in refusing to make an order for the recovery of possession by the landlords in the circumstances. The son was the appropriate tenant by succession by virtue of s. 12, sub-s. 1 (*g*) of the Act of 1920, and the question for determination is whether the plaintiffs can bring the case within the first sch. to the amending Act of 1933. The son had no contractual title to the tenancy. His father, to whom he succeeded as tenant, acquired the tenancy in consequence of his employment by the landlords, and held it subject to the terms of his employment, one of the incidentals of which was that his contractual tenancy could be terminated by the landlords if he ceased to be in their employment. That incidence continued after he became a statutory tenant in 1921. The words in para. (*g*) (i.) of the first sch. to the Act of 1933 : " the tenant was " in the employment of the landlord " must refer to the original contractual tenant, in this case, the defendant's father, and the landlord's right to terminate the tenancy of the father if the father had ceased to be in his employment was not defeated by the death of the original contractual tenant. That could not have been the intention of Parliament. The consequences of such an interpretation would be at variance with the fundamental rights of a landlord to obtain possession. [*Brown* v. *Draper* (1) ; *Murton* v. *Aldis* (2) ; *Read* v. *Gordon* (3), were referred to.]

The defendant did not appear.

Scott L.J. This case raises one of the many problems

(1) [1944] K. B. 309.
(2) (1929) 141 L. T. 168.
(3) [1941] 1 K. B. 495.

which present difficulty in the interpretation of the Rent Restrictions Acts. Here there was a contractual tenancy, which became statutory. The tenant died, and his son succeeded him under s. 12, sub-s. 1 (*g*) of the Act of 1920. The house had been let to the father because he was in the plaintiffs' employ. The son was not. The question at issue is this. The landlords in 1945 required the cottage in question as a residence for a person in their employment, and they claimed to be entitled to possession under s. 3, sub-s. 1 (*a*) and the first sch. to the Act of 1933. It is clear that the particular facts of the present case, which may be typical, are not expressly dealt with in the Rent Restriction Acts, but Mr. Safford, for the landlords, submitted that to carry out the policy intended by Parliament, the tenancy of a person in the position of the present tenant must be held to come within para. (*g*) (i.) of the first sch. of the Act of 1933. He therefore contended that the words " the tenant was in the employment of the landlord," ought to be construed in such a case as the present as referring to the tenant to whom the house had been let, who became tenant at a time when he was in the employment of the landlord and who had remained in that employment until his death. I think that that construction is right.

The son continued to occupy the house as statutory tenant for a period of years without ever entering the landlord's employment, but, in order to test the meaning of the paragraph, let me imagine a case where all the requirements of the paragraph exist up to the moment of the original tenant's death. Then take the case of a widow, who automatically becomes the tenant under s. 12, sub-s. 1 (*g*) of the Act of 1920. In that case, if the landlord happens, immediately after the widow has become the statutory tenant, to require the house for a person employed by him at the time, there is no difficulty in treating the words of sub-para. (i.), " the tenant was in the employment " of the landlord " as obviously referring to the tenant who has just died, and the landlord's right of possession as attaching at once to the widow's statutory tenancy. Indeed, unless that right is inferred, the effect of the provisions of the Act of 1920, creating a right in the widow to become a tenant, would be at variance with the express right of the landlord to recover possession irrespective of alternative accommodation. I cannot think that it was the intention of Parliament to confer on a widow an absolute right to remain a statutory tenant for the rest of her life; and still less so on any other member of the family. The whole purpose of the provisions of the Act as to recovery of possession by the landlord of premises let in connexion with employment and again wanted in connexion with employment, would be defeated if that were the interpretation. The passage of time between the death of the first tenant and the subsequent need of the landlord for the house for someone else in his employment can make no difference.

I therefore read the words " the tenant " in para. (*g*) (i.) of the sch. I. to the Act of 1933 as including a person who became tenant because he was in the employment of the landlord at the time he became tenant, and therefore received the tenancy subject to defeasance in the events contemplated by the Act, and whose tenancy, subject to defeasance, was transferred by s. 12 of the Act of 1920. The right of the landlord and the liability of the tenant are co-extensive in that respect, and a tenancy carried on by the provisions of the Act as to the succession of a widow or other relation is the same tenancy with its advantages and disadvantages unaltered. I therefore think that the appeal should be allowed.

MacKinnon L.J. I agree. The plaintiffs were the owners of a cottage and they issued a plaint against the defendant asking for an order for possession. The defendant was not in occupation as an ordinary contractual tenant or as a trespasser, but by virtue of s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, because he was a member of the late contractual tenant's family, namely that tenant's son—who was residing there at the date of the tenant's death. To obtain an order for possession the plaintiffs must satisfy the judge that their claim comes within para. (*g*) of the first sch. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. They must prove first that the house is wanted for a person in their employment, and secondly, that the tenant was in their employment, and that the dwelling-house was let to him in consequence of his employment. The dwelling-house in this case never was let to the defendant in consequence of his employment, or at all. It was let to the father, and the son became a statutory tenant under s. 12, sub-s. 1 (*g*) of the Act of 1920. Prima facie, the plaintiffs satisfied the second condition so far as the father was concerned, but the defendant contended in the court below that that was insufficient, and that the plaintiffs must also show that he (the defendant) had been in their employment. I think that that contention is wrong. In my opinion the words " the tenant " in para. (*g*) (i.)

of sch. I. to the Act of 1933 mean the original tenant, between whom and the landlord the tenancy was created, and that view is emphasized by the words "let to him." The only person to whom the house was let in the present case was the father. I think that it is quite wrong to enlarge the meaning of the word "tenant" by reference to the definition in s. 12, sub-s. 1 (*g*) of the Act of 1920. This court had to impose a limitation of the effect of the definition clause in *Summers* v. *Donohue* (1). I think that in the present case the county court judge wrongly acceded to the defendant's contention. The question was whether the father was in the employment of the plaintiffs and whether the dwelling-house was let to him in consequence of that employment. It is clear on the facts that that was so. The plaintiffs have therefore, in my opinion, made out their claim and the appeal should be allowed and an order for possession made.

Lawrence L.J. I agree. I think that the words "except "where the context otherwise requires" in s. 12, sub-s. 1, of the Act of 1920 require a different meaning to be given to the word "tenant" in para. (*g*) (i.) of the first sch. to the Act of 1933 for the reasons already stated by MacKinnon L.J., and that the word "tenant" in that sub-paragraph means the original contractual tenant.

Appeal allowed.

Solicitors for the plaintiffs: *Jackson & Jackson, for Furniss & Furniss, Worksop.*

H. G.

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(1) [1945] K. B. 376.

[RAILWAY AND CANAL COMMISSION.]

In the Matter of the RAILWAYS (VALUATION FOR RATING) ACT, 1930, and in the Matter of an Appeal by the LONDON AND NORTH EASTERN RAILWAY COMPANY, Schedule A—Canteens.

1945
June 11, 12;
July 18.

Wrottesley J., Sir Francis Taylor K.C. and Sir Francis Dunnell.

Rates and rating—Railway—Canteen—Occupation—Provision of canteen by railway company—Presence of caterers, by agreement with railway company to supply railway employees with hot meals and refreshments—"Railway hereditament"—Premises not so let out to caterers as to be capable of separate assessment—Railways (Valuation for Rating) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.

By a contract in writing between a railway company and caterers it was agreed that the company should provide certain

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IN THE MATTER OF THE RAILWAYS (VALUATION FOR RATING) ACT, 1930, AND IN THE MATTER OF AN APPEAL BY THE LONDON AND NORTH EASTERN RAILWAY CO., SCHEDULE A —CANTEENS.

canteens with their apparatus for the caterers to run by supplying hot meals and refreshments for railway employees, to be sold at prices agreed between the company and the caterers, the company to maintain the fixed equipment with tables, benches and chairs and the caterers to maintain loose cooking utensils, miscellaneous crockery and cutlery provided by the company. The caterers were to pay for the food and the wages of the members of the canteen staff to be provided by them, who were to be deemed to be their servants. The caterers were to receive the gross takings and were to indemnify the company against claims by third parties for accidental injury and food poisoning, including those by servants of the company, except for accidental injury to them, when carrying out work for the company under the agreement. They were also to provide facilities for railway employees to warm cooked food brought by them from home, and were to be at liberty to sell cigarettes, tobacco and sweets to the railway employees. The contract was for two months certain, and thereafter from month to month determinable by one month's notice in writing by either party as regards some or all of the canteens. The caterers entered on their work at the canteens and carried out the terms of the agreement. The company appointed a catering superintendent who supervised the workings of all the canteens, and also catering divisional inspectors who had to visit the canteens and report on them. Two of the twelve canteens, those at Doncaster and Shildon Waggon Works, were the subject of the appeal. At the former the canteen was open night and day throughout the week ; at the latter it was kept open from 8 a.m. to 6 p.m. From 9 p.m. it served as a mess-room or rest-room not demanding any service from the caterers. This canteen was closed from Saturday to Monday morning. Meetings of employees and concerts were held there, but so that they did not interfere with the caterers' duties. The kitchen and store-rooms were locked when the caterers were absent :—

Held, that the two canteens were not so let out to the caterers as to be capable of separate assessment and were " railway " hereditaments " within the meaning of s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930.

Reasoning of *Westminster Council* v. *Southern Railway Co.* [1936] A. C. 511, followed.

APPEAL from the Railway Assessment Authority.

A contract in writing dated June 16, 1942, made between the London and North Eastern Railway Company and John Gardner (London), Limited—the caterers—contained the following terms :—

" 1. The caterers shall subject to the terms and conditions " hereinafter contained provide hot meals and refreshments " to the employees of the company at canteens to be provided " by the company at the works and premises of the company "set out in the schedule hereto or at such other works and "premises as may from time to time be agreed between the "parties. 2. The caterers shall be at liberty to provide and "sell to the said employees cigarettes tobacco and sweets. "3. The caterers shall provide hot meals and refreshments "at all necessary times as may be required by the company "to be sold at such prices as may be mutually agreed between "the company and the caterers. The food to be provided "shall be of good quality and in as good variety as circum-"stances will permit and shall in all respects comply with the "reasonable requirements of the company. 4. The caterers "shall maintain and when necessary renew and replace all "loose cooking utensils miscellaneous equipment crockery "and cutlery (other than the utensils and equipment to be "provided and maintained by the company as hereinafter "mentioned) and shall make good all breakages whatsoever "and howsoever caused. The caterers shall keep the canteens "and all cooking utensils miscellaneous equipment crockery "and cutlery in a clean condition to the satisfaction of the "company. 5. The caterers shall be responsible for the "provision of the necessary staff who shall be deemed to be "the servants of the caterers and not of the company. 6. The "caterers shall bear the cost of :—(*a*) The provision of all "food and other goods consumed or sold on the premises; "(*b*) The wages of all staff employed at the canteens in the "preparation and service of all meals and refreshments; "(*c*) All other expenses in connexion with the canteens "arising under this agreement except expenses to be borne "by the company under clause 10; and shall be entitled to "receive for their own use and benefit the gross takings for "all meals and refreshment sold. 7. The caterers shall "indemnify and keep indemnified the company from and "against all claims by third parties (including the servants "of the company) in respect of any accidental injury to any "such third party while at the canteens or in respect of any "illness caused by food poisoning and the caterers shall for "the further and better protection of the company effect "and keep on foot such policies of insurance as the company "may consider necessary in respect of any of the matters "aforesaid. Provided always that the indemnity hereby "given shall not extend to include accidental injury to the "servants of the company when in the canteens for the purpose "of repairing and maintaining the equipment or of carrying

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" out any work or doing anything thereon which the company " are required to do under the terms of this agreement. " 8. The caterers shall provide to the reasonable satisfaction " of the company and without making any charge therefor " facilities to employees and workmen of the company for " warming cooked food brought to the canteens by such " employees and workmen.

" 9. The company shall provide the canteens together with " loose cooking utensils miscellaneous equipment crockery " and cutlery and shall provide and install repair and maintain " in good working order all necessary fixed equipment for " cooking and serving the meals and refreshments including " tables benches and chairs. 10. The company shall bear " the cost of lighting and heating the canteens and of solid " fuel gas electricity steam and water consumed on the canteen " premises. 11. This agreement shall remain in force for " two months from the date hereof and thereafter from month to " month until determined by either party giving to the other " one month's notice in writing to determine the same. " Provided always that either party may determine the agreement in respect of any of the canteens mentioned in the " schedule hereto without determining it in respect of all. " 12. Upon determination of the agreement the caterers shall " vacate the canteens and leave the same in a neat and tidy " condition to the reasonable satisfaction of the company " together with all fixed and loose cooking utensils tables " benches chairs and miscellaneous crockery and cutlery " including such as may have been provided by the caterers " in replacement of those damaged broken or worn out during " the term of the agreement."

The schedule contained 12 different works and premises of the company at which they were to provide and equip, and the caterers to run, canteens, two of which were the subject of this appeal: that at Shildon Waggon Works and that at Doncaster. At Doncaster, the company built a completely new canteen. At Shildon the company already had a messing hall which their servants had been in the habit of using and it was only necessary to add kitchens and other accommodation. The caterers entered on these canteens and had since their entry carried out the terms and conditions of the agreement. The employees, whether they bought their meals or not at the canteen were entitled to eat them in the canteen halls. The company appointed a catering superintendent who superintended the working of all the canteens provided under the agreement. Catering divisional supervisors were also appointed by the company operating under different departments of the company who had to visit the canteens frequently and report upon them. A local committee was, in general, set up on which sat representatives of the company, of the caterers and of the employees using the canteen.

At Doncaster the canteen was for the use of the ordinary railway working staff, porters, engine drivers and guards and was kept open day and night throughout the week, catering hours being fixed by the company. At Shildon the canteen was opened at 8 a.m. on Monday, so far as the kitchen was concerned, shut at 6 p.m. and re-opened at 9 p.m., after which it served as mess room or rest room, not demanding any service from the caterers. These hours prevailed throughout the week until Saturday when the canteen closed until Monday morning. Whenever it was convenient for the company to do so, they held or allowed to be held, meetings of their employees for various purposes and concerts at this canteen, but they never held or permitted any meeting of any kind to be held which would interfere with the carrying out by the caterers of their duties under the agreement. The kitchen and store-rooms were locked up when the caterers were absent At Doncaster it was impossible for the company to use, or permit to be used, the halls of that canteen except as a canteen or rest or messing room. At both canteens the representatives of the company were in the habit of calling upon the caterers to keep the premises and the equipment clean and generally so to conduct the whole business as to comply with the agreement.

The railway assessment authority decided that the two canteens were not "railway hereditaments," having regard to the definition of those words in s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930 (1), holding that the general

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(1) By s. 1, sub-s. 3 of the Railways (Valuation for Rating) Act, 1930 :—" For the purposes " of this Act . . . . ' undertaking ' " in relation to a railway company " includes, in addition to the " principal undertaking of the " company—(*a*) any canal, dock " or harbour undertaking carried " on by the company ; (*b*) any " subsidiary or ancillary under- " taking carried on by the com- " pany, not being a road-transport, " sea-transport or air-transport " undertaking ; and (*c*) the share " of the company in any joint " undertaking carried on by, or " on behalf of, two or more railway " companies not being a road- " transport, sea-transport, or air-

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inference to be drawn from the agreement and the actual facts was that the caterers were in paramount (if not exclusive) control of the premises.

The railway company appealed.

Comyns Carr K.C. and *Colin H. Pearson* for the company: The railway company after consultation with the Ministry of Labour in both cases by a moral duty and possibly, by reason of the Factory (Canteens) Order, 1940, in the case of Shildon, owing to the presence of Shildon Waggon Works, where some direct munition manufacture was carried on, by a statutory duty, provided these two canteens with their equipment and apparatus and agreed with the respondents, the caterers, that they should there provide their railway employees with hot meals and refreshments. It was the company who occupied the canteens, and if the caterers had any occupation thereof, the company had the "paramount "occupation" within the meaning of those words in *Westminster Council* v. *Southern Railway Co.* (1). There was no letting of the premises by the company. The caterers merely have the rights given to them by the agreement. The fact that on the termination of the agreement the caterers by clause 12 shall "vacate" the canteens does not show that there was occupation of them by the caterers, since if a person is admitted to a house for employment there must be some provision for getting rid of him. By an elaborate system of inspection the company saw to it that these canteens were properly run. Extensive use was made of the Shildon premises for other purposes than catering and the company could have used them for such purposes at Doncaster, had the canteens not been required all round the clock for catering. In *Reg.* v. *Morrish* (2) the agreement with caterers was very similar to that in this case, but here the control exercised over the caterers is much greater. Yet it was held in that case that the caterers were not in rateable occupation. In *Frank*

"transport undertaking; but save "as aforesaid, does not include "the share of the company in any "joint undertaking; 'railway "'hereditament' means, subject "as hereinafter provided, any "hereditament occupied for the "purposes of the undertaking of "a railway company: Provided "that no premises occupied as a "dwelling-house, hotel or place of "public refreshment, or so let out "as to be capable of separate "assessment, shall be deemed to "be, or to form part of, a railway "hereditament."

(1) [1936] A. C. 511.

(2) (1863) 32 L. J. (M. C.) 245.

Warr & Co., Ld. v. *London County Council* (1) where the lessees of a theatre granted an exclusive right to caterers to supply refreshments in the theatre for a term of years, it was held that the contract did not confer on the caterers " an " interest in land " which could form the subject of compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. In both these cases the right to provide refreshments to the public was a valuable right for which the caterers were willing to pay a large sum. In this case the company were exercising a moral duty by getting these expert caterers into their canteens to provide their employees only, not the public, with hot meals and refreshments. The canteen was essential for the welfare and efficiency of the company's employees as it was for the employees of the laundry in *London Co-operative Society, Ld.* v. *Southern Essex Assessment Committee* (2), a derating case. If there were any occupation by the caterers here, the question is whose occupation was paramount: see the speech of Lord Russell of Killowen in *Westminster Council* v. *Southern Railway Co.* (3). On the facts here, it is plain that the occupancy of the railway company was paramount.

Harold Williams for the respondents, the caterers: I support the argument for the appellants. The sole question at issue is whether these canteens were " so let out as to be capable of " separate assessment," and the emphasis of that expression is on the words " capable of separate assessment." The caterers do not either occupy or possess land: they are merely assisting in the performance of the moral duty of the railway company to secure the welfare and efficiency of their employees. See the judgment of Tucker J. in *London Co-operative Society, Ld.* v. *Southern Essex Assessment Committee* (2). Lord Russell of Killowen said in *Westminster Council* v. *Southern Railway Co.* (4): " It is immaterial " whether the title to occupy is attributable to a lease, a licence, " or an easement." I stress the words " title to occupy." Lord Wright said (5): " All these premises are in fact possessed " and used by the various persons to whom they are let by " the railway company for the purposes of their several trades " and businesses." It is clear, however, that to be capable of separate assessment there must be some relation between the parties which is akin to that of landlord and tenant—not

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(1) [1904] 1 K. B. 713.
(2) [1942] 1 K. B. 53.
(3) [1936] A. C. 529.
(4) Ibid. 533.
(5) Ibid. 544.

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to that of master and servant or of employer and employee. It is a question of fact, not of title, since a trespasser may be rateable. But the agreement must be considered on the question of fact. Here there were no parcels, no defined area for possession and there was no rent or payment of that nature or payment by the caterers to the company of any kind. The schedule to the agreement details works belonging to the company. The agreement gave no title to occupy or right to possession. No doubt, if there were occupation in fact, that would not matter. See the well-known observations of Lord Russell on occupation in *Westminster Council* v. *Southern Railway Co.* (1). There was no term granted in the agreement and though there was an obligation to vacate in cl. 12, there was no right to re-enter. In the *Westminster* case (2) where a licence or easement was granted, there were agreements for quiet enjoyment and against assignment. In the case of the tea-room there was a licence for a term of years, a rent paid, with undertakings by the licensees to pay rates, to repair and not to assign. Here the caterers were to supply food which complied with all the reasonable requirements of the company. It would be odd that an occupier of land should be informed how he was to cook food. The facts that the caterers make a profit from the sales is irrelevant. The caterers were in no sense in occupation of the land and these canteens were not let out to them so as to be capable of separate assessment.

Maurice Fitzgerald K.C. and *Neep* for the respondents, the Doncaster Corporation and the Shildon Urban District Council: It is plain, from *Westminster Council* v. *Southern Railway Co.* (2), that the form of the agreement is immaterial. Tenancy is not essential to create rateable occupation. There was here occupation and rateable occupation by the caterers and if there was a rival occupation by the company the occupation of the caterers was paramount. The caterers occupied the canteens by their servants and the food they provided—in the case of Doncaster continuously. They were the only persons permanently in the canteens and they had exclusive occupation.

[WROTTESLEY J. If the caterers were in occupation, why was it necessary to give them the right to sell cigarettes, tobacco and sweets?] The clause would be inserted out of caution and to enable the caterers to get the assistance of the company in obtaining the necessary licences. The means by which the caterers or the company are remunerated is

(1) [1936] A. C. 529.

(2) Ibid. 511.

immaterial. Power of re-entry is unnecessary, since the company could terminate the agreement by a month's notice. Those respects in which this agreement was unusual were conditioned by the circumstances of service which the company had to provide. The control exercised over Smith's bookstalls in the *Westminster* case (1) was greater than the control exercised by the company over these canteens since the control of the company was over the meals provided and not over the premises. The company could have supplied the meals and refreshments themselves but they did not do so and placed the caterers in possession of the canteens for that purpose.

Craig Henderson K.C. and *Sydney G. Turner K.C.* and *Simes* for the respondents, the railway assessment authority. A canteen is a shop and if the questions were asked, " who runs " these canteens ? " " who occupies these premises as a shop ? " the answer is " the caterers." Who is entitled in law to occupy the premises as a shop ? The caterers, since they hold the necessary licence from the Ministry of Food. Again, who has the beneficial occupation of the canteens ? The caterers. The indemnity clause of the agreement shows that the caterers are responsible for the safety of the employees of the company who come there for rest and refreshment—safety both from accident and food-poisoning. The caterers have the exclusive possession of the premises for their use as a canteen. See p. 68, para. 67, of Ryde on Rating (7th ed.). There is nothing in the agreement to authorize the company to use the canteen at Shildon at any time which would interfere with the running of the canteen when it is open. The *Westminster* case (1) shows that attention must be concentrated on what is the occupation, in other words, what is the use of the premises. The right to use the canteens is clear from cl. 12, which provides that on determination of the agreement the caterers are to " vacate " them. *Reg.* v. *Morrish* (2) was not cited in the *Westminster Council* v. *Southern Railway Co.* (1), but it must be taken to have been implicitly overruled unless it is possible to say that the paramount occupation was in the Royal Commissioners for the Exhibition. The decision in *Frank Warr & Co., Ld.* v. *London County Council* (3) is irrelevant for a man may be in rateable occupation of land, although he has no interest in it. The question of rateable occupation does not depend on whether possession is for a

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(1) [1936] A. C. 511.

(2) 32 L. J. (M. C.) 245.

(3) [1904] 1 K. B. 713.

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fixed term or is merely at the will of the owner. *Rex.* v. *Munday* (1), *Rex.* v. *Green* (2) and Ryde on Rating (7th Ed.), para. 29, at p. 34. [*Electric Telegraph Co.* v *Salford* (3) was also referred to.]

Comyns Carr K.C. replied.

Cur. adv. vult.

July 18. The judgment of the court was read by WROTTESLEY J. The railway company and the caterers alike contend on the facts that these two canteens are not "premises . . . . so let out as to be capable of separate "assessment" within the meaning of s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930. The company relies on the reasoning to be found in *Westminster Council* v. *Southern Railway Co.* (4) and says that the caterers do not occupy these canteens because, if they are one of two occupiers, the company being the other, the caterers are not the paramount occupiers. They also rely on *Reg.* v. *Morrish* (5) and refer to the case of *Frank Warr & Co., Ld.* v. *London County Council* (6) where the court had to decide whether the rights of caterers to supply refreshments at a theatre constituted an "interest in land" under the Lands Clauses Consolidation Act, 1845, s. 68. For the caterers, Mr. Williams contended that in the phrase "premises . . . . so let out as "to be capable of separate assessment" the emphasis must be laid on the words "capable of separate assessment" and he relied on *London Co-operative Society, Ld.* v. *Southern Essex Assessment Committee* (7). There the judges had to decide whether a canteen like these was primarily occupied and used for purposes not those of a factory or workshop and Viscount Caldecote C.J. and Tucker J. found that the canteen was an essential part of the factory. It is further submitted by him that the agreement here created a relationship more akin to that of master and servant than to that of landlord and tenant. For the respondents, the Doncaster Corporation and the Shildon Urban District Council, Mr. Fitzgerald contended that as a matter of fact the caterers occupied the premises and there was nothing in the agreement to displace that. The control of the company related not to the premises

(1) (1801) 1 East, 584.
(2) (1829) 9 B. & C. 203.
(3) (1855) 11 Exch. 181.
(4) [1936] A. C. 511.
(5) 32 L. J. (M. C.) 245.
(6) [1904] 1 K. B. 713.
(7) [1942] 1 K. B. 53.

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but to the meals provided. It was clear, he said, since *Westminster Council* v. *Southern Railway Co.* (1), that tenancy was not essential in order to create rateable occupation. On behalf of the Railway Assessment Authority, Mr. Craig Henderson laid stress on the indemnity clause in the agreement and said that in order that the caterers should carry out the agreement they must have rateable occupation. In the main, the authority relied on Lord Russell of Killowen's judgment in the *Westminster* case (1) as showing that since the right of control over the premises was in the caterers exclusively during catering hours the caterers were the rateable occupiers. Moreover we were warned not to attach importance to questions whether there was a fixed term or even whether the occupation was merely at the will of the owner; for the person in possession was prima facie the occupier for rateable purposes, unless it could be shown that some other person was occupier, or that no one was in occupation. In fact, both sides relied on the decision in the *Westminster* case (1) and on the opinions expressed and the reasons given for the decision in that case, particularly by Lords Russell and Wright.

The decision in *Westminster Council* v. *Southern Railway Co.* (1) is binding on us, but as a decision it is no guide. Had the bank premises, the subject of that case, been provided by the railway company for the purpose of enabling railway servants to bank their wages or their savings, and for no other purpose, there would have been a decision of the House of Lords binding on us in this case. But on the contrary, the premises in question in that case were let to the bank in order that they might carry on their banking business with such of their ordinary clients as should find it convenient to attend at those premises. By this means the railway company disposed of land not needed immediately for railway purposes to advantage to themselves, by ensuring a rental, and with advantages to the public for whom they catered, by providing a facility other than travel. Similarly, if the bookstalls, the subject of that case, had been bound to sell only publications of value to railway servants, and only to them, there would have been a decision binding on this court. But, on the contrary, what was contemplated and what took place, was the sale of newspapers and so forth to the passengers using the railway company's system.

We are therefore thrown back on the reasoning contained

(1) [1936] A. C. 511.

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in the opinions in that case in order to see if they enunciate a principle which can guide us. The facts in this case differ in more respects than they resemble the facts in any of the cases under consideration in *Westminster Council* v. *Southern Railway Co.* (1). In all those cases a rent was reserved: in this case none, nor any other pecuniary consideration. By itself that is an element not conclusive in either direction. In most of those cases a specific area was let in order that the lessee in it might carry on his business with his customers. But in this case the railway company entered into an agreement for the benefit of their servants, and for its fulfilment, provided places in which the caterers should be able to carry out the agreement. They have never provided a place in which the caterers should carry on their business at large. In those cases the railway company imposed restrictions—which do not ordinarily apply to demised premises—aimed at ensuring that the premises let (e.g., bookstalls carried on on a station platform) should not impede the orderly conduct of the railway company's business. In this case the conditions imposed are not of a negative or restrictive, but of a positive, kind, and are that the caterers shall cook and serve meals at times and in places chosen by the railway company and up to a standard which that company imposes, using the equipment provided by the railway company for the purpose. In those cases the railway company let premises to persons in order that they might carry on businesses, which a railway company could not carry on without obtaining special powers to do so. In this case the railway company by contract employed a firm of contractors to perform functions which—it has been agreed on all hands—they could have performed themselves, had they chosen to do so. A question arose whether the company were under an obligation to provide these canteens under the Factory (Canteens) Order, 1940, dealing with factories, but the better opinion seems to be that this order did not apply to the railway company and in any event could not have applied to them except in respect of some waggon works at Shildon, where a certain amount of direct munition manufacture was carried on. The functions exercised by the railway company were described as being duties imposed upon the railway company either by statute or decency. Neither is necessary to be alleged. It is sufficient to say that the carrying on of these canteens promoted the well-being and contentment,

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(1) [1936] A. C. 511.

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and so the efficiency, of their servants. The only instance considered in the *Westminster Council* v. *Southern Railway Co.* (1), which resembled even remotely the case before us, was one of the Beckenham premises. These included premises let to a builders' merchant, defined and delineated in plans, and to be used as a depot for storing builders' materials which had been or were going to be conveyed over the company's system. But even here there was a rent reserved, for which, if in arrear, distress could be levied: and the licensee agreed to bear rates and taxes. The licensees were limited in the hours when they might be on the premises, and had to keep the premises clean. But the purpose to which the storage was devoted was the business carried on by the licensees with their own customers. I have alluded in detail to the circumstances which characterized those cases, because a reference to them will be found either in the opinion of Lord Russell of Killowen or in that of Lord Wright, or in both, and must therefore be taken to be elements in those cases whose weight led to the decision.

I turn therefore to such principles as are found in the opinions in *Westminster Council* v. *Southern Railway Co.* (1) to see if they afford any guide in this one. In argument before us it was suggested that in view of those opinions it was of no use or of little importance to look at the agreement. We find nothing in either speech to suggest that we should not look at the agreement. What was said there was that in order to establish rateable occupation it was not necessary to find a demise; that the form of the document leading to the occupation, whether lease, licence or easement, was not important; but that the nature of the occupation was important. We have a case where the evidence shows behaviour on the part of both the company and the caterers entirely consistent with the agreement. In that case it would be wrong not to look at the agreement to fill out any gaps, and explain any action on the part of the parties to it. Thus a man in apparent occupation of a wood may not exercise the sporting rights. He may refrain, either because he dislikes blood sports, or because he is unskilful, or because the sporting rights were reserved by the grant which gave him the right to roam in and develop the woodlands. On the other hand the occupation de facto may be something quite different from, and far exceeding, anything to which the document entitles him. If so, the rating authority, and on recourse to them the

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courts of this country can and will look at the facts and not be halted by the production of a written agreement, or the evidence of an oral one. Applying this principle in the fullest sense, we find an occupation by, that is to say the physical presence of, the caterers exactly when and where that is necessary for the fulfilment of the contract, and no further. Thus if an " all " round the clock " service is necessary, the caterers will be found there either all round the clock or for enough hours to enable them to supply meals all round the clock, at the meal times fixed by the company. If no service is needed at week-ends, then the caterers will not be there at week-ends, and the premises will be available, and are in fact used by the company for meetings of the various benevolent societies of their servants. In either case the larger halls are open to the companys' servants for rest, and to bring and eat their own food (brought from home), and the caterers are even liable to warm up this food. The kitchen and store-rooms are, it is true, locked up when the caterers are absent. If this case is approached from the historical point of view, we find first the contract, then the provision by the company of proper cooking and serving premises and apparatus, and then, and only then, the presence of the caterers. From this it results that if the provision of meals is curtailed the use of the premises will be similarly curtailed, leaving them to be used by the company as they may be advised, so long as this user does not interfere with the capacity of the caterers to carry out their duties under the agreement.

The other principle to be extracted from the *Westminster* case (1) is that a court must ascertain which of two parties, if both occupy it, has the paramount position. That question is not answered by saying which makes the most use of it. For the lodging-house keeper does not make so much use of the rooms he lets to his lodger as does the lodger, and the gardener may well spend more time in the garden than his master. So far as the principles laid down in the *Westminster Council* v. *Southern Railway Co.* (1) are applicable to this case, they seem to us to indicate that it is impossible to attach to the occupation of premises by persons in the position of the caterers the adjective " paramount." They were given the use of the premises and the equipment for the purpose of carrying out their agreement. The circumstances are not unlike those in *Reg.* v. *Morrish* (2) save that in that case the

(1) [1936] A. C. 511.

(2) 32 L. J. (M. C.) 245.

caterers were allowed to deal with the public, and expected to deal with persons attending the exhibition : they were not confined to catering for the staff of the exhibition. Broadly speaking, the caterers in the case before us were given the same freedom, and subjected to the same restrictions as a wise housekeeper gives to a cook and the kitchen staff. There was not, of course, the same power of control as the master of the house retains over those who live in his household. But the relationship is one impossible to reconcile—in our view—with the occupation by the caterers, in a rating sense, of the premises where they carried on the duties imposed by the agreement. The appeal, therefore, will be allowed.

Appeal allowed.

Solicitor for the company : *Miles Beevor.*

Solicitors for the caterers : *Forsyte, Kerman & Phillips.*

Solicitors for the Doncaster Corporation and the Shildon Urban District Council : *Sharpe, Pritchard & Co., for J. K. Hope, Clerk to the Durham County Valuation Committee, and H. S. Essenhigh, Town Clerk, Doncaster.*

Solicitors for the Railway Assessment Authority : *Torr & Co.*

C. G. M.

[RAILWAY AND CANAL COMMISSION.]

IN THE MATTER OF THE RAILWAYS (VALUATION FOR RATING) ACT, 1930, AND IN THE MATTER OF AN APPEAL BY THE LONDON AND NORTH EASTERN RAILWAY COMPANY.

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June 13, 14, 15;
July 19.

Wrottesley J., Sir Francis Taylor K.C. and Sir Francis Dunnell.

Rating and valuation—Railways—Timber-stacking yards vacant during war—" Occupied "—Railway hereditaments—Entry in railway valuation roll—Rateability of railway company as owners—Railways (Valuation for Rating) Act, 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3*; s.* 11, *sub-s.* 1 (*a*).

A railway company had carved out defined areas from its dock area for use as timber-stacking yards, and had let them for long periods to various timber merchants. During the war and the period covered by the assessments in question, these yards, owing to fear of enemy action, were left vacant and not used for any purpose :—

Held, that they were not railway hereditaments within s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930, as they

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were not occupied—i.e., beneficially occupied by the railway company—during that period, and should not be entered on the railway valuation roll.

Held, also, that the railway company were not rateable as owners, as there was nothing in the Act of 1930 to indicate an intention to assimilate the Scottish law of railway rating into the English system.

Held, further, that a change over from being unoccupied to being occupied was a " change which has . . . . occurred in the " occupation. . . . " within the meaning of s. 11, sub-s. 1 (*a*), of the Act.

Appeal from the Railway Assessment Authority.

The appellants, the London & North Eastern Ry. Co. (" the company "), were the owners of certain timber-stacking yards which they had carved out of their dock area, the respective limits of each yard being clearly defined. For many years before the war these yards had been let for long periods to timber merchants. All these yards were excluded from the second railway roll as being " so let out as to be capable of " separate assessment " within the meaning of s. 1, sub-s. 3, of the Railways (Valuation for Rating) Act, 1930 (1). During the war, and during the period covered by the assessments in question, these yards, owing to fear of enemy action, were vacated and lay empty. In preparing the third railway roll the Authority decided to treat these yards as not being railway hereditaments or part of railway hereditaments. The company contended that while they awaited re-letting they were either railway hereditaments or had lost their identity as hereditaments altogether, and had merged back into the principal hereditament, the docks. The Authority decided that they were not railway hereditaments or parts of railway hereditaments.

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(1) Railways (Valuation for Rating) Act, 1930 (20 & 21 Geo. 5, c. 24), s. 1, sub-s. 3: " For the " purposes of this Act . . . . " ' Railway hereditament ' means " . . . . any hereditament occupied for the purposes of the " undertaking of a railway company: Provided that no " premises occupied as a dwelling-" house, hotel or place of public " refreshment, or so let out as to be " capable of separate assessment, " shall be deemed to be, or to form " part of, a railway hereditament."

Section 11, sub-s. 1: " If at " any time during a quinquennial " period. . . . (*b*) a hereditament " not entered in the roll as a rail-" way hereditament occupied by " the company ought to be so " entered by reason of some " change which has, since the date " on which the draft of the relevant " part of the roll was settled, " occurred in the occupation . . . ." the Authority shall make the requisite alteration.

The company appealed.

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Comyns Carr K.C. and *Colin Pearson* for the company.

Craig Henderson K.C. and *Sydney G. Turner K.C.* for the Authority.

Maurice Fitzgerald K.C. and *Neep* for the Hull City Council.

Cur. adv. vult.

July 19, 1945. The judgment of the court was read by WROTTESLEY J. The subject matter of this appeal is timber stacking yards at the London and North Eastern Ry. docks at Hull. They are yards served by sidings conveniently laid out so as to enable timber to be brought there from the docks nearby, stored, and distributed in due course by the railways of the company. For many years these yards were used for this purpose, some of them being let for long periods to timber merchants, others, though not exclusively let, yet being earmarked and set aside for the use of specific merchants over long periods of years, payment in this case being according to the actual area used, which was ascertained by a monthly measurement. All these yards were excluded from the second roll as being so let out as to be capable of separate assessment. As to the yards let out under the latter arrangement, the railway company challenged the correctness of the action of the Railway Assessment Authority (hereinafter called the Authority) but forbore during the war to appeal against it. Therefore so far as the court is concerned the decision of the authority stands and the present appeal is not concerned with that decision.

During the war it became either inadvisable or unlawful, or both, to store timber in these yards, in view of possible enemy action, and accordingly they were vacated. It did, however, become possible to employ some part of these yards for the storage of non-flammable material. Moreover, in some cases the old tenancies were continued. In neither of these cases does any question now arise. They are clearly premises so let out as to be capable of separate assessment. But that leaves a number of yards formerly let out in one way or the other but now lying empty. They are, of course, as suitable as ever for the reception of timber from abroad, when areas such as the Baltic once more are thrown open to commerce. It is not suggested that they have been, or are going to be, diverted from the purpose for which they were laid out.

If, in fact, the railway company should take these premises into use as railway hereditaments, then s. 11, sub-s. 1 (*b*), of the Railways (Valuation for Rating) Act, 1930, provides the necessary machinery for dealing with this change. The argument that a change over from being unoccupied to being occupied is not a "change which has . . . . occurred in the "occupation, or the character of the occupation, of that "hereditament" is one which we are unable to accept.

When they prepared the third roll, the Authority took the status of these timber yards into their consideration and decided to treat them as not being railway hereditaments or parts of railway hereditaments. The railway company says that while they await reletting or appropriation in some other way they either are railway hereditaments, that is to say, separate railway hereditaments, or else lose their identity as hereditaments altogether and merge back into the principal hereditament out of which they had, many years ago, been carved, namely, the railway hereditament, the docks. If either of the railway company's contentions is right, the Authority have incorrectly treated the premises as not being a railway hereditament or part of a railway hereditament and that is a matter on which, under s. 9, sub-s. 2 (*b*), an appeal lies to this court. The Kingston-upon-Hull City Council are respondents to this appeal, as well as the Authority, and both contend that these timber yards are not railway hereditaments within the meaning of s. 1, sub-s. 3, of the Act of 1930, because they are not occupied for the purposes of the railway undertaking.

Turning now to the arguments advanced by the appellants, it was said that though on this appeal no question of valuation arose, yet the position of the hypothetical tenant must still be borne in mind, and if these yards were not part of the undertaking the hypothetical tenant would not get them, and so could make no use of them. We cannot follow this argument. This roll is to show the net annual and rateable value of every railway hereditament in England, that is to say, hereditaments occupied for the purposes of the undertaking of a railway company, but excluding, inter alia, premises so let out as to be capable of separate assessment. So long as these premises were let out neither the rents from them nor the expenditure on them were included in the calculation leading up to the net annual value of the undertaking, and now that they lie empty and unused they produce no rent or revenue. If they should be let again, both revenue and expenditure will be disregarded.

If the railway should take them into use in some way which constitutes them railway hereditaments, they will fall to be dealt with under s. 11 of the Act, which provides machinery for this purpose. But in the meantime we cannot see that the financial position of the hypothetical tenant of the admitted railway hereditament will be any more difficult to assess by reason of the fact that these hereditaments will have to be left out of the reckoning.

This is, however, a convenient stage to notice another argument which emerged late in the proceedings before us, as the result of a reference to the case of *Rex* v. *Melladew* (1). That was the case of a warehouse-owner, who let warehouses or space in warehouses. In the course of his business he so arranged matters as to leave one of his warehouses vacant, with the necessary weights, scales and trucks stored in the warehouse next door. But he kept the warehouse ready for the reception of goods at any minute and offered to re-open it directly he got enough demand to cover 50 per cent. of its capacity. In those circumstances he declined to pay the rate on the empty warehouse. Collins M.R., contrasting him with the owner of a dwelling-house who is trying to let it, said (2): " In the case of the owner [of a dwelling-house] " seeking to find a tenant in the case put, no assertion of " occupation by him is involved. If he gets a tenant, he " substitutes the occupation of another person for his own. " The warehouseman in getting a customer supplies visible " evidence of his own occupation. In the case of the owner " who tries to let the intention is not to occupy. In the case " of the warehouseman it is exactly the reverse. It seems to " me on the facts found by the justices, which I need not repeat, " that the intention of the defendant here was as far as possible " to avoid the semblance of occupation while carefully guarding " the substance. He carefully retained the control, while his " continuous intention was to utilize the premises for the " purpose of his business whenever the opportunity offered." Farwell L.J. pointed out (3) the impossibilty of holding that the rateability of a warehouse fluctuated with its user, whether it were full, half full or empty. The evidence in the case before us was not directed to this point and there was nothing to indicate that the railway company were in regard to these yards in the same position as the warehouse owner in that case,

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(1) [1907] 1 K. B. 192.

(2) Ibid. 202.

(3) Ibid. 204.

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and other than in the position of the owner of empty offices, which he is willing to let. If we were to decide this case on the narrow ground that the railway company were intending to let space at any moment for casual occupation, we should be deciding something for which we had little or no material by way of evidence, and on a ground which would not apply to all kinds of premises let out by railway companies, such as houses and offices. In fact the case was put before us as a case of principle, and a test case, to decide the proper treatment in the case of let-out premises, void when the roll came to be completed. This argument, moreover, was only an afterthought. It would not apply to the case of a dwelling-house, void pro tempore.

The principal ground on which the appellants based their appeal was that the Act intended to assimilate the practice in respect of the rating of railways to that of Scotland, and accordingly we were asked to follow the decisions in two Scottish cases dealing with void premises. There are at any rate two particulars in respect of which the Scots law and practice of rating differs from that of England. One of these is that in England owners of property are never rated as such whereas in Scotland owners as well as occupiers are liable, in the general case, to rates. The other is that in Scotland, before the Act of 1930, undertakings such as railways and canals were assessed as units and their value as a whole was distributed throughout the various rating areas afterwards. By the Act of 1930 this more logical system of rating railways was adopted and applied in England, instead of the previous somewhat haphazard system under which, in each parish, an independent endeavour was made to assess the value of that bit of the railway undertaking which lay within the parish. The courts and the litigants groaned under this endeavour to apply the law of 1601 to a type of hereditament which Elizabethans can hardly have been expected to contemplate, but they did their best.

In 1851, Lord Campbell C.J., in *Reg.* v. *Great Western Ry.* (1), and in 1859 Wightman J. in *Reg.* v. *West Middlesex Waterworks Co.* (2), drew attention to the absurdities of the system. In 1930 Parliament passed the Act which in this respect should assimilate the law of England to that of Scotland, treating for rating purposes the undertaking as one, ascertaining its yearly value, and distributing that value among the various parishes in which the undertaking lay. But there the assimi-

(1) (1851) 15 Q. B. 379, 396, 397. (2) (1859) 1 E. & E. 716, 728.

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lation stopped, and there is nothing, expressed or implied, in the Act of 1930 to indicate that in England railway companies are to be liable to pay rates as owners, as they would have been in the like case in Scotland. Indeed there is time and again in the statute the employment of the word " occupier " when England is under consideration, whereas when we refer to s. 22, which contains the provisions as to value of Scottish parts of railway undertakings carried on in England and in Scotland, we find that the " cumulo yearly rent or value " that is to be fixed is " of the lands and heritages in Scotland belonging to " or leased by such railway company and forming part of its " undertaking."

Accordingly in *London and North Eastern Ry.* v. *Assessor for Glasgow* (1) it was decided that two plots of vacant ground in Scotland belonging to the railway company and unlet, neither of which had ever been used for railway purposes, were nevertheless part of the railway undertaking and should not enter the local roll. Entry in the local roll would mean that they were not to be treated as part of the railway undertaking. But there is no corresponding provision in s. 1, sub-s. 3, of the Act to the effect that hereditaments in England occupied or owned for the purpose of the undertaking were to be railway hereditaments and rateable accordingly. These Scottish cases, therefore—the case cited above and a similar case, *London and North Eastern Ry. Co.* v. *Assessor for Stirlingshire* (2)—are decisions for which the peculiarity of the Scots law of rating provides a ratio decidendi ; but there is no similar ground for such a decision in respect of hereditaments which are situate in England and whose status has to be judged by the law of rating in England.

The next point taken by the appellants was that there is no reason why the court should treat these yards as separate hereditaments. As to this it is not merely clear from the plan that these yards are defined areas, marked out and divided by the railway sidings which intersect the area and divide them into convenient widths, but in addition they have been carved out of the dock area by the appellants themselves and let to various persons, either for terms of years, or under the second system above referred to. Nothing has been put forward to suggest that there is the least difficulty in identifying the yards and their limits. There is not, so far as we know, anything to prevent the court from being told the history of

(1) 1936 S. C. 338. (2) 1937 S. L. T. 123.

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these spaces, even if this were necessary, in view of the plan and the knowledge that Hull was one of the principal ports for trade from the Baltic. To do what the railway company asks us to do here, therefore, is to disregard the very facts which lie at the base of this appeal, namely, that these areas were let separately as hereditaments to various timber merchants, were used by them for years, and that they are now, owing to reasons depending on the war, empty. The decision in *Consett Overseers* v. *Durham County Council* (1), throws no light on this case, dealing as it did with a number of blast furnaces, all part of one undertaking, and thrown out of use in rotation for the purpose of re-lining. Certainly there is nothing in the case of the general offices at Waterloo Station, decided by this court in *Southern Ry. Co.* v. *Railway Assessment Authority* (2) to indicate that we ought to take such a course.

In addition, the appellants put forward two propositions (1.) that the owner of a hereditament occupies it until he has parted with it, (2.) that even if such an occupation must be beneficial, that does not mean that it must produce a pecuniary profit. It is enough that it enables him to discharge a duty. To deal with the second proposition first, there is no doubt that comparatively slight evidence of use on the part of the owner is sufficient to justify the inference that he is the occupier and therefore rateable. We none of us feel the slightest difficulty in assenting to the decision of the House of Lords in *Liverpool Corporation* v. *Chorley Union* (3). One of the purposes for which a water undertaking may purchase land is in order to use it as a catchment area for moorland water, and, if so, it will exclude all user which could possibly contaminate the water gathered there. In such an area it will not be surprising to find farming and even grazing forbidden and no other use permitted than sport and afforestation. Nevertheless the owners will be in occupation, and will find it essential to remain in occupation in order to safeguard the purity of the water gathered there, by supervising such user as they may permit. But such a case is in complete contrast with that of a house or office or a yard which the owner lets when he can. Such premises are, ordinarily speaking, occupied when he lets them and are unoccupied when he cannot, and this latter event is that with which we have to deal. In *Winstanley* v. *North Manchester Overseers* (4), Lord Atkinson quoted, apparently with approval,

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(1) (1922) 128 L. T. 310.

(2) (1935) 22 Ry. & Can. Tr. Cas. 269.

(3) [1913] A. C. 197.

(4) [1910] A. C. 7, 14.

Lord Kenyon's opinion in *Rex* v. *Lord Mayor of London* (1), and said that the owner " who had such possession of land as " would enable him to bring an action of trespass must be held " to be in occupation, unless it was proved that some other " person was in occupation." But it is clear that what was referred to there was not beneficial occupation. And Lord Atkinson goes on to the next point, namely, whether the occupation in question, that of the rector in respect of a graveyard, was beneficial, i.e., of value ; and it turned out that it was, because by virtue of his occupation the rector received moneys for the sale of graves. Similarly again turning to *Rex* v. *Lord Mayor of London* (1), it is found to be the case of a bargeway and tollgate, where there was the right to charge fees in the nature of wayleaves or tolls. Both instances seem to be precisely the kind of occupation which we have referred to above, slight in nature, but sufficient to show that the owner asserts his right to occupy and in fact occupies when it suits his pocket. That may be constantly or rarely according to the circumstances and the nature of the hereditament. All this is made clear by Lord Atkinson himself in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (2).

Turning now to the first proposition : does the railway occupy at all from the point of view of rateability ? The answer—so far as the evidence is concerned—is that it makes no sort of use of these yards at all. After some hesitation that was the attitude taken up by the railway company. Indeed only on this basis could the court be asked to deal with the question as a matter of principle, and I have said already that comparatively slight evidence of user by a railway company in the case of lands between and around its railway stations, wharves, docks and other works will suffice to establish that the company has remained in occupation. We cannot imagine that the Authority will be astute to pick out such areas as the railway company may be keeping in reserve and using only occasionally, in order to claim that they are not railway hereditaments. The case of *North Eastern Ry.* v. *York Union* (3), shows the practical difficulty which would beset the Authority if they were to endeavour to enforce any such policy. But very different considerations apply in the case of areas which the railway company for its own motives has been able to carve out and let, without detriment to the exercise of its transport duties. The element of value there is

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(1) (1790) 4 T. R. 21, 26.

(2) [1913] A. C. 197.

(3) [1900] 1 Q. B. 733.

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quite absent from the possession which the railway company retains in respect of these lands, but once the element of value or benefit is eliminated then, if the intention to occupy is to be retained, it must, according to Wright J. be an intention to occupy in the rating year: see *London County Council* v. *Hackney Borough Council* (1). In that case Wright J. was dealing with a building which had been used as an industrial school, but had, during the relevant period, ceased to be so used. The owner had in mind to divert it to other educational purposes. In the case before us there was no evidence of any intention to occupy on the part of the railway company. *Associated Cinema Properties, Ld.* v. *Hampstead Borough Council* (2), was the case of premises deliberately acquired and kept as a stand-by, in case the owners' existing offices should be destroyed in warfare. In the absence of some overt act amounting to evidence of user, as du Parcq L.J. pointed out, never have the courts of this country found void premises to be in rateable occupation by the owners merely on the ground of ownership. In the case before us no occupation was even alleged let alone proved.

Finally, the appellants referred to the wording of the Act itself and contended that therein the word " occupy " means, in relation to England, not occupy rateably or beneficially, but bare occupation. By bare occupation here is meant, we suppose, what the ordinary plain man means by ownership, in respect of land which the owner lets when he can, but which is at the moment void, and of which he makes no use meantime. On the other hand, the respondents, the corporation of the City of Hull and the Authority, say that the premises to be included in the roll are railway hereditaments. That is implied in s. 3, sub-s. 1, of the Act, which provides as follows: " As soon as " may be after the constitution of the Railway Assessment " Authority, and thereafter at intervals of five years, that " Authority shall prepare a railway valuation roll showing the " net annual and rateable values of every railway hereditament " in England." So far as England is concerned " railway " hereditament " is defined in s. 1, sub-s. 3, and means " any " hereditament occupied for the purposes of the undertaking " of a railway company." " Hereditament " was already defined in the Rating and Valuation Act, 1925, s. 68, as meaning: " Any lands, tenements, hereditaments or property " which are or may become liable to any rate in respect of which

(1) [1928] 2 K. B. 588, 596.

(2) [1944] K. B. 412, 416.

"the valuation list is by this Act made conclusive" and so includes premises, void at the moment, but to be let during the year. For the Act of 1930 is, by s. 24, sub-s. 1, to be construed as one with (inter alia) this Act of 1925. Moreover the Act of 1925 is the Act providing the machinery under which—after the Act of 1930 has been complied with—rates are levied on railway companies whether in respect of railway hereditaments or hereditaments which are not railway hereditaments, such as hotels, etc., for what is in the roll is then entered in the valuation list and so becomes conclusive. In view of this it seems difficult to contend that the legislature when laying down what hereditaments were to be entered in the roll, was not dealing with hereditaments occupied rateably by the railway. The hereditament is to be there in order that the roll may show its net amount and rateable value (s. 13 of the Act of 1930): and it is to be there in order that there may be distributed on to it the proportion of the net annual value of the undertaking as a whole, which this particular hereditament has helped to earn (s. 6, sub-s. 1). The net annual value of the undertaking as a whole is assessed by reference to the performance of the company during a period of years. Furthermore, the revenue drawn from the let-out premises is specifically excluded: s. 4, sub-s. 3 (i.) (*b*). The same applies to expenditure upon them—s. 4, sub-s. 3 (ii.) (*e*).

When, therefore, the Authority is faced in s. 4, sub-s. 1 (*a*) with the problem of finding by reference to the average net receipts of the company the rent which the hypothetical tenant would pay, it is difficult to see what light will be thrown on the problem by considering the case of premises rent from which and expenditure on which are in terms excluded from the net revenue. Similarly, when we come to the apportionment of the net annual value of a railway company's undertaking as a whole, so far as it is carried on in England, among all the railway hereditaments in England occupied by that company under s. 6, sub-s. 1, of the Act, this must prima facie mean the hereditaments occupied beneficially or rateably by the company and forming part of the undertaking, seeing that these are the hereditaments the revenue from which and the expenditure on which have been ascertained. And the apportionment scheme, which is to be prepared under s. 13 has to embody principles securing that the hereditaments are valued, if railways, on an estimate of the traffic carried over them, and if not railways, then having regard to their value for the purposes

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IN THE MATTER OF THE RAILWAYS (VALUATION FOR RATING) ACT, 1930, AND IN THE MATTER OF AN APPEAL BY THE LONDON AND NORTH EASTERN RAILWAY Co.

of the undertaking. The latter is the case here and it is impossible to give effect to this principle in the case of hereditaments which are ex hypothesi of no value in earning the yearly net income. Generally speaking, we can find nothing in the Act to support the view that, as regards premises in England, the word " occupation " means anything but beneficial and so rateable occupation.

To sum up, we have to deal with hereditaments in regard to which, if by being let they produce a revenue, then by common consent they are to be omitted from the roll, and if, through not being let-out, they lie fallow, then they have not that element of value which is the only element which makes it of any use to include them in the roll. Whether, therefore, we apply to them the general law of rating, or the provisions of the Act, they are hereditaments which the legislature never intended, rebus sic stantibus, to be entered on the roll. That means that the appeal will be dismissed.

Appeal dismissed.

Solicitor for appellants : *Miles Beevor.*

Solicitors for Railway Assessment Authority : *Torr & Co.*

Solicitors for Kingston-upon-Hull City Council : *Sharpe, Pritchard & Co., for A. Pickard, Hull.*

W. L. L. B.

1945
June 11, 12.

Humphreys and Cassels JJ.

BENABO *v.* WOOD GREEN BOROUGH COUNCIL.

Local Government—House occupied by persons of the working classes—House let as two flats to two separate tenants—House unfit for human habitation—Person having control of house—Service of notice by local authority to execute certain specified works—Non-compliance with notice—Execution of works by local authority—Demand for payment of expenses thereby incurred—Validity of notice and demands —Contention that house was two separate dwellings—Housing Act, 1936 (26 *Geo.* 5, *&* 1 *Edw.* 8, *c.* 51), *s.* 9, *sub-s.* 1 *; s.* 10, *sub-ss.* 1 *and* 3 *; s.* 15, *sub-ss.* 1 *and* 5.

A house, which was built and used originally as a private dwelling house for one family only, was subsequently let as two flats to two separate tenants, one of whom occupied the ground floor and the other the upper floor. The tenants of the flats were persons of the working classes. No structural alterations in respect of the separate letting of the two flats had been carried out. The local authority served on the appellant, as the person having the control of the house, a notice under s. 9 of the Housing Act, 1936, requiring him to execute the repairs specified in the notice. The repairs not having been carried out the local authority caused the repairs to be executed by contractors and then served on the appellant a demand for payment of the expenses they had thereby incurred. The demand not having been complied with the local authority took proceedings under s. 10 of the Act of 1936 before a court of summary jurisdiction. On the hearing of the complaint the appellant contended that the demand was not valid as it was a single demand in respect of work carried out to two separate dwellings. The justices held that the house was not in fact two separate dwellings. On a case stated

Held, that Part II. of the Housing Act, 1936, including ss. 9 and 10, was not concerned with dwellings but with houses occupied by, or of a type suitable for occupation by, persons of the working classes. The object of the Act was to enable a local authority to render habitable a house which was in any respect unfit for human habitation, irrespective of the persons who occupied it, and that therefore the objection which had been raised to the validity of the notice and demand was a bad objection.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Tottenham, in the county of Middlesex, a complaint was preferred on behalf of the Wood Green Borough Council (the respondents), against Albert Joshua Benabo (the appellant), for that he, being the person having the control of the house known as No. 80 Winkfield Road, Wood Green, was indebted to the respondents in the sum of 75*l.* 10*s.* 0*d.* and interest thereon, being the amount of expenses incurred by them in carrying out to the said house the works specified in a notice under s. 9 of the Housing Act, 1936 (1), which notice was duly served upon him and was not

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(1) Housing Act, 1936. Part II. including ss. 2 to 24, contains "provisions for securing the "repair, maintenance and sani-"tary condition of houses."

Section 9, sub-s. 1: "Where a "local authority . . . . are satis-"fied that any house which is "occupied, or is of a type suitable "for occupation, by persons of the "working classes is in any respect "unfit for human habitation, they "shall . . . . serve upon the per-"son having control of the house "a notice requiring him" within a specified time "to execute "the works specified in the "notice . . . ."

Section 10, sub-s. 1: "If a "notice under the last foregoing "section requiring the person "having control of a house to exe-"cute works is not complied with, "then, after the expiration of "the time specified in the notice ". . . . the local authority may "themselves do the work required "to be done by the notice . . . ."

Sub-section 3: "Any expenses "incurred by the local authority "under this section, together with "interest, at such rate as the

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Benabo *v.* Wood Green Borough Council.

complied with. A demand for the recovery of the sum of 75*l.* 10*s.* 0*d.* and interest was duly served upon him on July 6, 1944, but remained uncomplied with, contrary to s. 10 of the Act of 1936 (1). The complaint was heard on October 20, 1944, when the court of summary jurisdiction ordered payment forthwith of the sum of 75*l.* 10*s.* 0*d.* with interest and costs.

On the hearing of the complaint the following facts were proved or admitted. The respondents were a local authority for the purposes of the Housing Act, 1936. On February 8, 1944, they, in pursuance of sub-s. 1 of s. 9 of the Act, served on the appellant a notice requiring him to execute within twenty-eight days the repairs specified in the notice to the house known as 80 Winkfield Road. The house was occupied by persons of the working classes, and the appellant was the person

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"Minister may . . . . fix, from "the date when a demand for the "expenses is served until payment, may . . . . be recovered "by them, by action or summarily "as a civil debt, from the person "having control of the house ". . . ."

Section 15, sub-s. 1: "Any "person aggrieved by—(*a*) a "notice under this Part of this "Act requiring the execution of "works; (*b*) a demand for the "recovery of expenses incurred "by a local authority in executing "works specified in any such "notice; (*c*) an order made by a "local authority with respect to "any such expenses; . . . . may "within twenty-one days after the "date of the service of the notice, "demand or order, or after the "refusal, as the case may be, "appeal to the county court "within the jurisdiction of "which the premises to which "the notice, demand, or "order relates are situate, and no "proceedings shall be taken by "the local authority to enforce "any notice, demand, or order in "relation to which an appeal is "brought before the appeal has "been finally determined."

Sub-section 5: "Any notice, "demand or order against which "an appeal might be brought to "a county court under this section "shall, if no such appeal is brought, "become operative on the expiration of the period of twenty-one "days mentioned in sub-s. 1 of "this section, and shall be final "and conclusive as to any matters "which could have been raised on "such an appeal . . . ."

Part V. of the Act, including ss. 71–104, relates to "the provision of housing accommodation "for the working classes."

Section 188, sub-s. 1: "In this "Act nnless the context otherwise "requires— . . . . 'House' includes any yard, garden, out-"houses, and appurtenances be-"longing thereto or usually "enjoyed therewith . . . ."

Sub-section 3: "For the purposes "of any provisions of this Act re-"lating to the provision of housing "accommodation, the expression "'house' includes, unless the "context otherwise requires, any "part of a building which is "occupied or intended to be "occupied as a separate dwelling."

having control of the house. The house was built and used originally as a private dwelling house for one family only, but at the date of the service of the notice, and for a considerable time prior thereto, was let by the appellant as two flats to two separate tenants, one of whom occupied the ground floor and the other the upper floor. No structural alterations in respect of the separate letting of the ground and upper floors had been carried out, but a cooker and sink had been installed in one room on the first floor which was used as a kitchen, and there was a kitchen on the ground floor. There was one external water closet used by both tenants and their families; and both tenants and their families used the same entrance door, hall and internal corridor. The respondents for rating purposes had separately assessed the ground floor and the upper floor.

The notice to repair not having been complied with, the respondents on March 20, 1944, gave notice to the appellant of their intention to enter the said house for the purpose of executing the works specified in the notice. The repairs were duly carried out by contractors and the respondents incurred expenses amounting to 75*l*. 10*s*. 0*d*. On July 5, 1944, a demand was served by the respondents on the appellant for payment of the said sum with interest. The appellant did not appeal to the county court, either against the notice or the demand under s. 15 of the Housing Act, 1936.

On the part of the appellant it was contended that the demand by the respondents was not a valid demand for the following reasons (amongst others), first, that it was a single demand issued in respect of work carried out to two separate dwellings, secondly, that it did not specify what expense had been incurred in respect of each of the said separate dwellings, and part of the work so specified had not, in fact, been carried out. For the respondents it was contended that the house was not in fact two separate dwellings, and that the demand was a valid demand.

The justices were of opinion that the house was not in fact two separate dwellings. The landlord appealed and the justices stated this case, submitting for the opinion of the court the question whether on the above statement of facts they had come to a correct determination and decision in point of law.

M. Grantham for the landlord.
Squibb for the local authority.

HUMPHREYS J. On the hearing of the complaint for the recovery of the expenses incurred by the local authority in carrying out the works specified in the notice a point was taken by the legal representative of the appellant that the local authority could not recover the money claimed because the demand was bad. It was alleged that the demand was bad because the notice was bad, and that the notice was bad because it and the demand which followed it related not to a house, but to more than one house—to two houses. That point having been raised, the justices have stated a case for our opinion upon the matter. I think it is possible that an extremely short answer might have been made to the contentions, namely, that it is purely a question of fact in each case for the tribunal of fact. The justices thought, however, that as it was a question which had been strenuously argued before them as a question of law, it was right and proper to ask this court for its opinion. In order to decide the matter it is necessary to read what is said in the case about this house [His Lordship having read the material paragraphs, continued :] The landlord, the person having the control of the house, had let certain rooms in the house to one person and certain other rooms to another person. Does that make the house two houses? In my opinion, emphatically it does not. It remained one house. I think that is the answer, and a complete answer, to this point which has been made. It is said that there are two dwellings here, inasmuch as two families are dwelling in this house, and that if there are two dwellings there must be two houses. Reference has been made to the Rent Restriction Acts and to the Rating Acts. It is perfectly true that the local authority under the Rating Acts have rated the two parts of this house as separate dwellings, since two sets of people are paying separate rents and occupying separately certain rooms. It may be—I do not decide it one way or the other—that for the purposes of the Rent Restriction Acts there are two dwellings here, but I search in vain in this statute with which we are dealing, namely, the Housing Act, 1936, for any indication that the Act is concerned with dwellings, as such, at all. It is not. This part of the Housing Act is concerned with houses. The object of the Act is not to apportion rent or to decide who is to pay the rates of these premises. It is to enable the local authority to put into a habitable state that which is not fit for human habitation. That is, the whole house qua house. It does not matter who occupies it. It might not have been occupied by anyone at all but nevertheless it clearly would come within the terms of s. 9 if it is a house which, in the words of the section, is " of a " type suitable for occupation by persons of the working " classes." I do not derive the least assistance in answering the question whether this is one house or two houses either from a consideration of the Rent Restriction Acts or from the fact, as stated in the case, that the rating authority has rated both the occupiers in respect of the particular part of the house they occupy.

The only other thing which need be said on that point is to refer to a matter brought to our attention by Mr. Squibb on behalf of the local authority. He points out that in s. 188 of the Act there is the following definition : " ' House ' includes " any yard, garden, outhouses, and appurtenances belonging " thereto or usually enjoyed therewith." Then by sub-s. 3 it is provided : " For the purposes of any provisions of this Act " relating to the provision of housing accommodation "—that refers to Part V. of the Act—the part we are dealing with is Part II.—" the expression ' house ' includes, unless the context " otherwise requires, any part of a building which is occupied " or intended to be occupied as a separate dwelling." I think that Mr. Squibb is right in his contention that it cannot be that the provision applies for the purposes of Part II. of the Act because it is strictly confined to Part V. of the Act. If it had been the intention of the legislature to apply it to Part II. of the Act it would have said so. The fact that the legislature has not said so is an indication that it only thought it necessary to make that special provision in regard to Part V. That is the answer which I make to the first point put forward here, the answer being that the notice served is a notice in accordance with s. 9, and therefore is a perfectly good notice. It is to be observed also that it is a notice which goes into the most minute detail of the work required to be done. The fact that it has not been complied with is the basis of the demand, which follows exactly the terms of the notice. I do not think it is suggested that if the notice is good the demand is bad. The contention is that the demand is bad because in law it relates to two houses. I agree that if it did relate to two houses it would be bad, but in my opinion, it does not. So much for the first point.

We have been referred to one authority, *West Ham Corporation* v. *Charles Benabo & Sons* (1). I entirely agree with the

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(1) [1934] 2 K. B. 253.

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judgment of Atkinson, J. in that case, in which, curiously enough, persons of the same name were concerned. The learned judge there had to decide certain matters under the Housing Act, but it was a totally different case. It related to a block of houses, and what was sought to be recovered were the expenses incurred in putting that block of houses into proper repair. The Act does not say anything about a block of houses. It speaks of a house. Atkinson J. said that the demand was bad because it ought to have related to a house and not to a great many houses. Of course that is so, but the judgment of Atkinson J. is of no assistance in this case.

In my opinion, this appeal fails, and should be dismissed.

CASSELS J. I agree. I do not think that because a house is divided into accommodation for two or more separate families the owner is entitled to separate notices and separate demands under Part II. of the Housing Act, 1936. The facts in this case are entirely different from the facts in *West Ham Corporation* v. *Charles Benabo & Sons* (1). That was a case in respect of work carried out by a local authority on twenty-three separate houses differently situated in one street. The local authority sent in one demand, which was not signed by the Town Clerk. The action was brought to recover one total sum. In the case we are considering now the owner was duly served with the necessary notice and did not comply with it. He took none of the steps available to him under s. 15 of the Act. When the work was done and the demand for the recovery of the sum of 75*l*. 10*s*. 0*d*. and interest was served, he took no notice of it. The matter then went before a court of summary jurisdiction where an order was made for payment forthwith. The owner of the house has come to this court to contend that the order of the justices was bad in law because there were two separate dwellings in this house which would be regarded as two separate dwelling houses under the Rent Restriction Acts because two separate families were occupying them, and because two separate rents were paid, and because there were two separate assessments, and because the owner would have a difficulty in calculating the apportionment of the cost of the repairs between the two separate parts of the house, so as to decide the percentage increase of rent he could demand. He submits that there should have been two demands, and particulars of the expense incurred in respect of each part of the dwelling house. The justices came to a very clear decision. It was short, it was

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(1) [1934] 2 K. B. 253.

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very straight, and it was very simple: "The house was not in "fact two separate dwellings." On the facts, I think that is a correct determination in law. It would be oppressive if a local authority administering this part of the Housing Act of 1936, and dealing with a neglectful landlord, had to serve him with separate notices and demands in respect of every room he had separately let.

I agree with my Lord that there can be only one result in this case, and that is that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Montague Adler & Arnold.*
Solicitor for local authority: *H. Chubb, Town Clerk.*

R. F. S.

Applied. BIDDLE *v.* TRUVOX ENGINEERING CO. LD. [1952] 1 K.B. 101

BADHAM *v.* LAMBS, LIMITED.

1945
June 11, 12.

du Parcq L.J.

Highway—Motor car—Sale in a condition unlawful for use on highway—Imposition of penalty—Right of action of purchaser—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 3 *sub-s.* 1, 113, *sub-s.* 2—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 8 *sub-s.* 1; *s.* 42 *sub-s.* 1.

By s. 8, sub-s. 1, of the Road Traffic Act, 1934, it is unlawful to sell a motor vehicle for delivery in such condition that its use on a road in that condition would be unlawful, and a penalty is imposed for breach of the sub-section. The defendants sold a car to the plaintiff which was in such condition, by reason of having defective brakes. The plaintiff brought an action for damages, based on the above breach of statutory duty:—

Held, that the main object of the Legislature was the punishment of offenders and there was nothing in the Act of 1934 to show that it was the intention of Parliament to protect the purchaser and to give him a right of action.

ACTION tried by du Parcq L.J., sitting as an additional judge of the King's Bench Division.

The plaintiff bought a second-hand motor car from the defendants, who were motor-car dealers. The brakes were to some extent defective, but there was no accusation of negligence against the defendants. Owing to the terms of the contract the plaintiff had no claim thereunder, but he contended that the defendants, in selling him the car with the defective brakes had been guilty of a statutory offence, viz., a breach of the Road Traffic Act, 1934 (1), which by s. 42 is to be read as one with the Act of 1930, and that the statute of 1934, in addition to imposing a penalty for breach of s. 8, sub-s. 1, intended to confer a right of action on the purchaser of a car sold in breach of that sub-section.

Ronald Hopkins for the plaintiff.
Hale for the defendants.

DU PARCQ L.J. having dealt with the claim under the contract, continued : The question is whether the plaintiff has a right of action. As far as the contract is concerned he is completely out of court, but there is a regulation having statutory force, which says that every motor car shall be equipped with an efficient braking system, and an Act of Parliament makes it unlawful to sell a motor car which has not an efficient braking system. Counsel for the plaintiff contended that it must be assumed that by s. 8, sub-s. 1, of the Act of 1934, Parliament was trying to protect the purchaser and give him a right of action. Parliament, however, does not say so, but says that if you sell a motor car which is not what it should be according to the regulations, you will be fined 20*l.* I do not think, in the light of the authorities, that I can accept the contention of counsel for the plaintiff. I am not at all satisfied that Parliament was seeking to protect the purchaser, who, after all, can always look after himself. He usually buys a car from somebody who knows about cars, and usually, unless he is an expert, he relies on the vendor, who knows more about the car

(1) Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 3, sub-s. 1: "Subject as hereinafter provided, "it shall not be lawful, to use on "any road a motor vehicle or "trailer which does not comply "with the regulations applicable "to the class or description of "vehicles to which the vehicle "belongs, as to the construction, "weight and equipment thereof."

Section 113, sub-s. 2, imposes a penalty of 20*l.* for breach of this regulation.

Road Traffic Act, 1934 (24 & 25 Geo. 5, c. 50), s. 8, sub-s. 1: "Subject to the provisions of this "section it shall not be lawful to "sell . . . . a motor vehicle . . . "for delivery in such a condition "that the use thereof on a road in "that condition would be unlawful "by virtue of the provisions of "s. 3 of the principal Act" [Road Traffic Act, 1930].

Motor Vehicles (Construction and Use) Regulations, 1937 (St. R. & O., 1937, No. 229) reg. 39 (i.): "Every motor car shall be "equipped with an efficient "braking system . . . ."

than does the purchaser. He thus has the benefit of an implied condition in the contract. If he wants expressly to provide against inefficiency of the brakes he can do so by contract. The main object of Parliament was the punishment of anyone who committed the offence of selling a car which was not fit, according to the regulations, to be on the road.

I think this case is very different from *Monk* v. *Warbey* (1) where it was held that the object and purview of the Act there in question showed that the penalties prescribed therein were not intended to be the sole remedy for a breach of the statutory duty. I do not think this case is distinguishable from *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (2) where it was held that it was not intended that anyone injured by a breach of a regulation made under the Locomotives on Highways Act, 1896, for which penalties were imposed, should have a right of action for damages, but that the duty imposed was a public duty only to be enforced by the penalty thereby imposed. The cases which have dealt with this principle, which after all is a very old one, go back to quite old authorities. It is stated by Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (3), and was enunciated by Lord Tenterden in 1831 in *Doe* v. *Bridges* (4). Lord Macnaghten said in *Pasmore* v. *Oswaldtwistle Urban District Council* (5): "Whether "the general rule is to prevail, or an exception to the general "rule is to be admitted, must depend on the scope and language "of the Act which creates the obligation and on considerations "of policy and convenience." When Lord Macnaghten said "the general rule" it must be understood that the general rule was that where a specific remedy given for non-performance of a statutory duty no other remedy is open to the subject. If I were to accept the argument of counsel for the plaintiff, I should have to say that this case came within the exception and not the rule. I am not satisfied that it does for the reason I have given. I cannot find any indication that Parliament was seeking to protect the purchaser, nor do I think, in the light of *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (2) that it would be right to say that Parliament was seeking to protect purchasers in the sense that it was giving a right to an action for damages to them as a class of persons, viz., as members of the public using the highway.

(1) [1935] 1 K. B. 75.
(2) [1923] 2 K. B. 832.
(3) [1898] A. C. 387, 394.
(4) (1831) 1 B. & Ad. 847, 859.
(5) [1898] A. C. 397.

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Badham v. Lambs, Ld.

For these reasons, although one feels sympathy for the plaintiff, I think this action fails and must be dismissed.

Solicitor for plaintiff: *J. H. Fellowes.*
Solicitors for defendants: *Cartwright, Cunningham & Co.*

W. L. L. B.

1945
Sept. 13.

Lynskey J.

Ex parte SPECULAND.

Appeal—Conviction by court of summary jurisdiction—Appeal to quarter sessions—Bail pending appeal—Amount fixed by justices—Application to King's Bench Division to vary—Jurisdiction.

A judge of the King's Bench Division has no inherent jurisdiction to grant bail, pending an appeal to quarter sessions, to a person committed in execution by a court of summary jurisdiction, and has no jurisdiction to reduce the amount where justices, in the exercise of their statutory powers, have fixed bail in a specified sum.

Summons heard in chambers by Lynskey J. (1).

On September 3, 1945, the applicant, Maurice Speculand (otherwise known as Maurice Morrison) pleaded guilty at Hendon police court to a charge of failing to register himself as a trader as required by s. 23, of the Finance (No. 2) Act, 1940. The justices imposed a fine of 4,040*l.*, with twenty guineas costs, and in the alternative twelve months' imprisonment. The applicant desired to appeal against the sentence to the Middlesex Quarter Sessions and asked for time to pay the fine. That application was refused and he thereupon applied for bail pending the appeal. The bench granted bail, fixing the amount in the applicant's own recognizances at 1,000*l.* and two sureties of 1,000*l.* The applicant applied to Lynskey J. in chambers to grant bail in a lesser sum.

Wetton for the applicant.
Christmas Humphreys for the Board of Customs and Excise.

Lynskey J., stated the facts and continued: The point taken before me by Mr. Humphreys on behalf of the Board of Customs and Excise, who prosecuted in the police court and

(1) His Lordship authorized the publication of his judgment for the assistance of the profession.

who would be the respondents on an appeal is that there is no inherent power in this court to grant bail in the circumstances of this case and no statutory power to do so. In support of that contention he relied on the decisions of Hallett J. in *Ex parte Blyth* (1) and *In re Lyttleton* (2). On behalf of the applicant, Mr. Wetton submitted, firstly, that those cases are not binding on me, since they are decisions of a judge of equal jurisdiction, and that I ought to disagree with them, and secondly, that the present case is distinguishable because here the justices in fact granted bail, and the only question is as to the amount of such bail.

Taking the first point, it is true that the decisions of a brother judge of equal jurisdiction are not binding on me, though, of course, one always pays the greatest respect to such decisions. In the present case I have read the judgment of Hallett J. in both the cases to which I have been referred, and I feel bound to agree with him. I regret that I should feel compelled to do so, because it seems to me very desirable that this court should have jurisdiction to deal with applications of this nature, but I have to apply the law as it is and not as I would desire it to be. That being so I feel that the reasoning of Hallett J. in *Ex parte Blyth* (1) and *In re Lyttleton* (2) is convincing: at any rate it convinces my mind. In my view the law was correctly stated, if I may say so with the greatest respect, by Lord Russell of Killowen C.J. in *Rex* v. *Spilsbury* (3), where he said: "This "court has, independently of statute, by the common law, "jurisdiction to admit to bail. Therefore the case ought to be "looked at in this way: does the Act of Parliament, either "expressly or by necessary implication, deprive the court of "that power? The law relating to this subject is well stated "in 1 Chitty's Criminal Law, 2nd ed., p. 97, as follows: "'The Court of King's Bench, or any judge thereof in vacation, "'not being restrained or affected by the statute 3 Edw. 1, "'c. 15 (4), in the plenitude of that power which they enjoy at "'common law, may, in their discretion, admit persons to bail "'in all cases whatsoever, though committed by justices of the "'peace or others, for crimes in which inferior jurisdictions "'would not venture to interfere, and the only exception to "'their discretionary authority is, where the commitment is "'for a contempt, or in execution'." In the present case the

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(1) [1944] K. B. 532.
(2) [1945] W. N. 24.
(3) [1898] 2 Q. B. 615, 620.
(4) Repealed by 50 & 51 Vict., c. 55, s. 39.

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Lynskey J.

commitment of the applicant is "in execution." The passage I have read is a clear statement of the law and, regrettable as it may be that this should be the law, I feel I am bound by it. This is my view apart altogether from the decisions of Hallett J. in the two cases to which I have been referred and with which I agree.

The second point taken by Mr. Wetton is that this case is different because here the justices granted bail but fixed it, he says, at an excessive amount. If this court has no jurisdiction to grant bail in such a case as *Ex parte Blyth* (1), where the court below could not grant bail at all, it seems to me a fortiori that this court has no jurisdiction to do so in such a case as the present where power is specially given by statute to the court below to grant bail. Here the justices have exercised that power and the complaint made is that they have exercised the power in a wrong way, by fixing a bail which is unreasonable. In my view this court has no power, on an application of this character, to sit as an appellate court from the justices when they are exercising their statutory discretion as to granting bail and fixing the amount thereof. That is sufficient to dispose of this application, which must be refused.

Application refused.

Solicitors for applicant: *Rich & Co.*

Solicitor for respondents: *Solicitor of Customs and Excise.*

(1) [1944] K. B. 532.

P. B. D.

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June 6, 7, 8; *July* 13.

Scott, MacKinnon and Morton L.JJ.

VYNER *v.* WALDENBERG BROTHERS, LIMITED.

Factory—Dangerous machinery—Circular saw—Height of guard above bench, always maintained at three and a half inches—Breach of statutory duty by employer—Consequent shifting of onus of proof—Proof of delegation of duty by employer—Woodworking Machinery Regulations, 1922 (*St. R. & O,* 1922, *No.* 1196), *regs.* 10, 11, 21 *and* 23—*Factories Act,* 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 14. *sub-ss.* 1, 2.

Where there is a definite breach of a safety provision imposed by statute on the occupier of a factory and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the occupier to show that the breach was not the cause of the injury.

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Even in those cases where the occupier is entitled to delegate his duty to a workman, he still remains under a personal duty with regard to the safety provision, unless he proves clearly that the workman to whom he has delegated the duty is fully apprised of the nature and extent of that duty and is competent to discharge it.

The plaintiff's left hand was injured when he was working at a circular saw. No one witnessed the accident and the plaintiff was unable to explain how it happened, but at the time the guard of the saw, in breach of regs. 10 and 21 of the Woodworking Machinery Regulations, 1922, was as much as three and a half inches above the bench, at the cutting edge of the saw, and generally speaking it had usually been kept at that height, and, if temporarily removed, replaced at that height. The plaintiff had for many years worked at the saw and the defendants, his employers, had left the operation of the machine and the adjustment of the guard to him, and he had always worked with guard at that height; but there was no evidence that the defendants had ever taught the plaintiff at what height the guard should be kept in order to comply with the regulations or taken any other steps to ensure compliance with them. In an action by the plaintiff against the defendants for damages for breach of their statutory duty, the trial judge held that the plaintiff had failed to prove his case in that his injury was caused not by the employers' breach of statutory duty, but by his own act, and alternatively that he had taken no proper precautions for his own safety in breach of reg. 23 (1.) of the Woodworking Machinery Regulations, 1922:—

Held, by the Court of Appeal, that the plaintiff had proved his case: that the defendants had consistently ignored their duty under regs. 10 and 21 which in effect amounted to a failure on their part to provide a proper guard, and as the provision of a proper guard by them was a condition precedent to the obligation imposed on the workman by reg. 23, the plaintiff was not guilty of a breach of that regulation, and that the defendants had never delegated their duty under the regulations to the plaintiff.

Murray v. *Schwachman, Ld.* [1938] 1 K. B. applied.

Smith v. *Baveystock & Co., Ld.* [1945] 1 All E. R. 531, distinguished.

Decision of Wallington J. reversed.

APPEAL from a judgment of Wallington J., at Leeds Assizes.

The plaintiff, Abraham Vyner, had been in the service of Waldenberg Brothers, Ld., the defendants, for thirty-five years as a wood carver and worker. On December 28, 1942, the plaintiff was working a circular saw, fourteen inches in diameter, which he had constantly used, at a factory occupied by the defendants, to which the Factories Act, 1937, and the

Woodworking Machinery Regulations, 1922, applied, sawing strips of wood from disused packing cases, ½ an inch thick, into strips ½ an inch wide. About one-third of the saw was above the bench. The guard of the saw could be raised or lowered by inches, but not by less than an inch. On this date the plaintiff while sawing the last cut of such a strip found his left hand in contact with the saw so that part of the thumb was cut off and the index finger lacerated.

By his action the plaintiff claimed damages on the ground that his injuries had been caused by the negligence and breach of statutory duty of the defendants under s. 14, sub-s. 1, of The Factories Act, 1937, and the Woodworking Machinery Regulations, 1922 (1). No witness, other than the plaintiff, saw the accident. The plaintiff's account was merely that he heard a "bang," something happened to the strip of wood and he found his thumb and finger cut and injured.

The main defence was that of contributory negligence, one ground of which was that the plaintiff was using the "single "cut"—i.e., pushing the strip of wood right through to the end of each cutting—and in so doing failed to use a push-stick, contrary to reg. 23 (ii.) of the regulations. The plaintiff's case was that he was using the method of the "double-cut," first cutting the strip for one half of its length, then withdrawing it, turning it over and applying the other end of the strip to the

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(1) Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part "of any machinery . . . . shall "be securely fenced, unless it is in "such a position or of such con"struction as to be as safe to every "person employed or working on "the premises as it would be if "securely fenced: . . . ."

Woodworking Machinery Regulations, 1922: "Part I. Duties "of Occupiers . . . . 10. Every "*circular saw* shall be fenced as "follows: . . . . (*b*) Behind and "in a direct line with the saw there "shall be a riving knife, which "shall have a smooth surface, "shall be strong, rigid and easily "adjustable, and shall also con"form to the following con"ditions: (i.) The edge of the "knife nearer the saw shall form "an arc of a circle having a radius "not exceeding the radius of the "largest saw used on the bench. "(ii.) The knife shall be main"tained as close as practicable to "the saw, having regard to the "nature of the work being done at "the time, and at the level of the "bench table the distance between "the front edge of the knife and "teeth of the saw shall not exceed "half-an-inch. (iii.) For a saw of "a diameter of less than 24 inches "the knife shall extend upwards "from the bench table to within "one inch of the top of the saw, "and for a saw of a diameter of "twenty-four inches or over shall "extend upwards from the bench "table to a height of at least nine "inches. (*c*) The top of the saw "shall be covered by a strong and saw, in which case a push-stick was not required. Wallington J., on this issue found for the plaintiff, finding that he was using the method of the "double-cut."

Wallington J., found that the riving knife was not rigid (reg. 10 (*b*)); that the distance between the front edge of the knife and the teeth of the saw at the level of the bench was more than ½ an inch (reg. 10 (*b*) (ii.)) (it was about 2½ inches and the knife was incapable of adjustment so as to be nearer to the saw than 2 inches). As a result the riving knife would be late in performing its function of keeping the cut open and so preventing the wood from binding and possibly being thrown back by the upward movement of the back of the saw. His Lordship found that there was no evidence to show that the defendants at any time instructed any person to adjust the knife or to see that it was, or continued to be, an appliance maintained from time to time in an efficient state (reg. 21). His Lordship also found that the guard was not a "strong" guard in that it was not rigid (reg. 10 (*c*)); that the flange did not extend below the roots of the teeth of the saw (reg. 10 (*c*)); and that the guard did not extend to a point as low as practicable at the cutting edge of the saw (reg. 10 (*c*)). The guard extended only to a point about 3½ inches from the surface of the bench and his Lordship found

"easily adjustable guard, with "a flange at the side of the saw "furthest from the fence. The "guard shall be kept so adjusted "that the said flange shall extend "below the roots of the teeth of the "saw. The guard shall extend "from the top of the riving knife "to a point as low as practicable "at the cutting edge of the saw.

"11. A suitable push-stick shall "be kept available for use at the "bench of every *circular saw* "which is fed by hand, to enable "the work to be carried on with"out unnecessary risk."

"21. The guards and other "appliances required by these "regulations shall be maintained "in an efficient state and shall be "constantly kept in position while "the machinery is in motion, "except when, owing to the nature "of the work being done, the use "of the guards or appliances is "rendered impracticable. The "guards shall be so adjusted as to "enable the work to be carried on "without unnecessary risk."

"*Part II. Duties of Persons* "*Employed.* 23. Every person "employed on a *woodworking* "*machine,*" which includes a circular saw, "shall—(i.) use "and maintain in proper adjust"ment the guards provided in "accordance with these regula"tions; (ii.) use the 'spikes' or "push-sticks and holders provided "in compliance with regulations "11, 14, 18 and 19; except when, "owing to the nature of the work "being done, the use of the guards "or appliances is rendered im"practicable."

that generally speaking it was kept at about that height, and that, if it was removed for the purpose of changing the saw, or for any other purpose, it was replaced in about the same position. The defendants were also, he held, in breach of reg. 21 in that the guard was not adjusted to enable the work to be carried on without unnecessary risk, and, further, were in breach of s. 14 of the Factories Act, 1937, and regs. 10 and 21 of the Woodworking Machinery Regulations, 1922. Had the matter rested there his judgment, he added, would have been for the plaintiff ; but he had to consider the defence of contributory negligence on another ground under reg. 23 (i.). The fundamental criticism of the guard was its distance above and from the saw—3½ inches—and this, it was submitted, caused or contributed to the plaintiff's injuries. There had been no express delegation by the defendants of their duties with regard to the height of the guard above the bench, but it was clear that for years the defendants had left the operation of the machine and the adjustment of the height of the guard to the plaintiff, and that the plaintiff did his work at the bench on that footing. The plaintiff himself had in his evidence approved the height of the guard and he had left or reinstated it, throughout the years, where it was on December 28, 1942. The plaintiff, therefore had failed to prove his case. Although he had established a breach of duty by the defendants, he had failed to prove that it caused or contributed to his injury, since his injury was caused by his own act. Alternatively, the allegation in the defence that the plaintiff had taken no proper precautions for his own safety, had been made out. Accordingly, it was unnecessary for him to express any opinion as to the other breaches of statutory duty with regard to the guard and the riving knife since on the case, as presented by the evidence, they did not appear to have had any material effect on the accident. There must be judgment for the defendants. The plaintiff appealed.

Edgedale for appellant.
Paley Scott K.C. and *R. Lyons* for defendants.

Cur. adv. vult.

July 13. The written judgment of the court was delivered by SCOTT L.J. The judge at the trial found that there had been a number of breaches by the defendants with regard to

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both the riving knife and the guard of this circular saw, and he indicated that had the case stopped there it would have meant judgment for the plaintiff. We agree with him, but we go further. If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty. As Lord Goddard said in the Court of Appeal in *Lee* v. *Nursery Furnishings, Ld.* (1) : " The " only point that has given me some hesitation in this case is " whether or not the evidence was sufficient for us to say that " it was due to this gap or breach of the regulation that the " accident happened. I have already said that one difficulty " in the case is the evidence which the young lady gave herself, " in which on certain points obviously she was mistaken. " In the first place I think one may say this, that where you " find there has been a breach of one of these safety regulations " and where you find that the accident complained of is the " very class of accident that the regulations are designed to " prevent, a court should certainly not be astute to find that the " breach of the regulation was not connected with the accident, " was not the cause of the accident. I think here that the " evidence is clear enough on one point. We have not only " got the evidence of the plaintiff that she was holding the " wood, and it was inherently likely that she would be holding " the wood; we also have got the evidence of a boy who, " although his evidence is somewhat vague, is quite firm on " one thing, and that is the young lady was holding this wood " with her right hand. If she was holding the wood, it is quite " possible—indeed, it is much more probable—that the hand " went where it did because of this gap." We therefore assume that in this case something unexpected did happen, and that it was that which caused the plaintiff's left hand suddenly to go forward and come into touch with the descending teeth. But that is just the sort of case where Parliament has intended the employer to bear the risk, and it is obviously one which, as Parliament realized, by the practice of insurance is distributed over the cost of the articles supplied and thus enters into the consumer's price.

The only decision which at first sight caused us a little doubt is that of this court in *Smith* v. *Baveystock & Co., Ld.* (1). It was there held that the employers had been entitled to delegate their own duty of adjustment, under reg. 21, to the injured plaintiff, but there are certain important differences between that case and this. There the injured man was an experienced hand who had spent most of his working life at circular saws and knew all about them. The employers had there definitely delegated to him the performance of their duty of adjusting the guard. Here not only had there been no express delegation, but the guard had regularly been maintained at a level far higher than it ought to have been, and the plaintiff had never been reprimanded, still less taught what was right. We think the defendants must be regarded as knowing quite well about the height of three and half inches above the bench-table at which the learned judge finds the guard was regularly maintained. That was obviously a very serious breach of the regulations, and we cannot see how it can be consistent with the intention of the regulations that the occupier of the factory should be able to say either " I thought that was not a breach " under reg. 21 " or, " the workman ought to have adjusted it " under reg. 23." The only real way of preventing accidents is to hold the occupier responsible under a personal duty, unless he proves clearly that he has delegated his duty to a definite person who knows how the guard to the machine and its safety appliances ought to be made and set. If the manager, foreman or other person fails in the duty, it is, of course, no defence for the employer sued by some other person; it is only if the person injured by the failure is himself the very person to whom the employer has delegated the duty, that the employer has a defence. In the last case the decision of this court in *Smith* v. *Baveystock & Co., Ld.* (1) applies. But even if the delegate is himself the suffering party it is important to keep in mind the decision of this court in *Murray* v. *Schwachman, Ld.* (2). There this court (Greer, Slesser and Greene L.JJ.) held that the employers, having ordered the injured workman not to use the guard, had failed to provide a guard, and that was equivalent to a total failure by them to provide a guard, with the consequence that, as the provision of a proper guard by the employer is a condition precedent to the obligation imposed on the workman by reg. 23, that regulation had not been brought into operation. Here the employers altogether shut their eyes to regs. 10 and 21, and in particular to the proper adjustment of the guard, especially in respect of height —a vital point—and let the machine continue to be used for years with the guard at the wrong height. How then can it be just to put the blame on the workman?

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(1) [1945] 1 All E. R. 387, 390.

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(1) [1945] 1 All E. R. 531.

(2) [1938] 1 K. B. 130.

For the above reasons we have come to the conclusion that nothing short of a definite delegation of authority and duty in regard to maintenance to a person properly qualified and instructed can absolve the occupier of the factory from his duties under regs. 10 and 21. If there had been any real but unexpressed delegation of authority to the plaintiff to perform the defendants' statutory duties, there would certainly have been some reprimand of him for not seeing that those duties were properly performed. The truth is, we expect, that the defendants did not take the trouble to ascertain what kind of guard was required by the statutory rules or did not care whether they were being broken. If so, it would be absurd to draw an inference that their responsibility had in the present case been shifted by delegation on to the shoulders of the plaintiff.

There is the further point, apart from the breaches of regulation as to the guard itself, of the breaches of duty in regard to the riving knife, found as facts by the learned judge. The onus of proof that they did not contribute causally to the accident was on the defendants and, in our opinion, was not discharged. We therefore do not think that any of the learned judge's reasons for putting the blame on the plaintiff hold good. The appeal must be allowed and judgment entered for the appellant for the 330*l.* 10*s.* 0*d.* damages provisionally fixed by the learned judge.

Appeal allowed.

Solicitors for appellant: *Shaen, Roscoe & Co.*

Solicitors for respondents: *Corbin, Greener & Cook, for Pullan, Davies & Co., Leeds.*

C. G. M.

Distinguished. R. F. FUGGLE, LTD. *v.* GADSDEN. [1948] 2 All E.R. 160.

Considered. ROYAL, ETC. PORCELAIN CO. *v.* RUSSELL. [1949] 2 K. B. 417

C. A.

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June 21 ;
July 3.

Scott, MacKinnon and Morton L.JJ.

BENNINGA (MITCHAM), LIMITED *v.* BIJSTRA.

Landlord and tenant—Rent restriction—Landlord's claim for possession—" Required . . . . for occupation as a residence for some person " engaged in [landlord's] whole-time employment "—Material date—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*a*) *; sch. I.* (*g*).

On a claim by landlords for possession of a dwelling-house, without proof of suitable alternative accommodation, on the ground that it is reasonably required by them for occupation as a residence for some person engaged in their whole-time employment, within the meaning of sch. I. (*g*) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the material date on which possession is so reasonably to be required is that of the hearing.

Semble, the words " engaged in his whole-time employment " in sch. I. (*g*) mean actually working for the landlord, and not engaged to work for him in the future.

APPEAL from Croydon county court.

The plaintiffs were margarine manufacturers in Mitcham. The defendant entered their employment in 1933 as an engineer, and in November, 1941, they bought a house, 27 Mortimer Road, close to their factory, for him to live in. He paid 10s. a week rent and was given a rent book. On December 13, 1944, with the assent of the national service officer, the plaintiffs, under the Essential Work Order, 1942, dismissed the defendant, and on February 13, 1945, gave him notice to quit the house. On March 20, 1945, they issued a plaint in the Croydon county court under the Rent Restrictions Acts, claiming possession of the dwelling-house, serving therewith particulars of claim. These alleged, inter alia, that notice to quit had been served on February 13, 1945, that the defendant had been in their employment, but had ceased to be so, that the house had been let to him in consequence of that employment, and that it was reasonably required by them for one Schuler, a person engaged in their wholetime employment. The defendant had paid the rent to the plaintiffs since his dismissal, and was still in occupation, although he had found employment with competitors of the plaintiffs. In February, 1945, the plaintiffs had arranged with Schuler to succeed the defendant as engineer. As he had to give notice to his then employers, and get released, he was only able to commence work for the plaintiffs on April 16, 1945. He had to live in lodgings half an hour's walk from the factory and his wife had to remain in Hull until he could find a proper dwelling. The plaintiffs claimed possession, relying on s. 3, sub-s. 1 (*a*) of and sch. I. (*g*) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1). The county court judge on May 2, 1945, made an order for possession to be given on June 20.

The defendant appealed.

Eddy K.C. and *Willett* for the defendant. The county court judge was wrong. The plaintiffs' cause of action was that they reasonably required this house for the occupation of Schuler, a person engaged in their whole-time employment. That cause of action must be complete, according to the ordinary rule, at the date of the issue of the plaint, March 20, 1945. But on that date Schuler was not " engaged in [the plaintiffs'] " whole-time employment " within the meaning of sch. I. (*g*). Those words mean " actually working for," which he was not doing until April 16, 1945. Prior to that date he was engaged for that employment but not in it. The corresponding words in s. 1, sub-s. 3, of the Act of 1915, and s. 5, sub-s. 1 (*d*) of the Act of 1920, were " in his employ " and " in his whole-time " employment " respectively. The word "engaged" was added in the Act of 1933 in order to show that the employee must be actually at work.

The judgment of the county court judge was based on the passage in the book by the editors of Law Notes on the Rent

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32) s. 3, (1) (*a*) : " No order or judgment " for the recovery of possession " of any dwelling-house to which " the principal Acts apply or for " the ejectment of a tenant there- " from shall be made or given un- " less the court considers it " reasonable to make such an order " or give such a judgment, and " . . . . (*a*) the court has power " so to do under the provisions " set out in the First Schedule to " this Act." Schedule I. " A court " shall, for the purposes of s. 3 of " this Act, have power to make or " give an order or judgment for the " recovery of possession of any " dwelling-house to which the " principal Acts apply or for the " ejectment of a tenant therefrom " without proof of suitable alter- " native accommodation (where " the court considers it reasonable " so to do) if . . . . (*g*) the " dwelling-house is reasonably " required by the landlord for " occupation as a residence for " some person engaged in his " whole-time employment . . . . " and . . . . (i.) the tenant was in " the employment of the landlord " . . . . and the dwelling-house " was let to him in consequence of " that employment and he has " ceased to be in that employ- " ment."

Restrictions Acts (19th ed.), p. 217, which is not correct. [*Rex* v. *Rogers. Ex parte Hodson* (1) per Darling J., and *Spencer* v. *Fox* (2) per Lord Hewart C.J., were referred to.] At the time of the notice to quit, the defendant was not in the employment of the plaintiffs and the house was let to him on a new tenancy which, therefore was not granted "in consequence of his "employment." [*Read* v. *Gordon* (3) was referred to.]

Bussé for the plaintiffs. The crucial date was that of the hearing, May 2, 1945, when the question whether the relief asked for should be granted was considered. The words of sch. I. (*g*) are "is" reasonably required: *Nevile* v. *Hardy* (4). On that date Schuler was undoubtedly actually engaged in the employment, and at that time the house was reasonably required for his occupation. No new tenancy was created by the acceptance of rent after notice to quit, for by s. 16, sub-s. 3, of the Act of 1920, such rent is to be treated as mesne profits.

The plaintiffs have proved a contract for a whole-time engagement made in February, 1945, and that is sufficient to satisfy the words "engaged in." It is immaterial whether it was carried out according to its terms or not.

Eddy K.C. in reply referred to *Bond* v. *Pettle* (5).

Cur. adv. vult.

July 3. MACKINNON L.J. read a judgment in which, after stating the facts, he continued: The defendant's counsel called no evidence but submitted that on the pleadings and the facts proved the judge must refuse the plaintiffs' application for possession. In making the order for possession the county court judge must have thought it "reasonable" under s. 3, sub-s. 1, and it would indeed have been surprising if, on the facts, he had thought otherwise. Three contentions were urged before us by counsel for the defendant. First, that at the material time the defendant was not in occupation of the house by reason of his employment by the plaintiffs; that he was in occupation after he ceased to be in their employment by virtue of a new tenancy granted to him by the plaintiffs, who had accepted rent pursuant to that tenancy. Secondly, that at the material time Schuler was not a person engaged in the whole-time employment of the plaintiffs, seeing that he only began his

(1) [1918] W. N. 128.
(2) [1922] W. N. 141, 142.
(3) [1941] 1 K. B. 495.
(4) [1921] 1 Ch. 404, 407.
(5) *The Times*, Jan. 15, 1921.

actual work on April 16, 1945; and, thirdly, that the material time for both these considerations was March 20, 1945, the date of the issue of the plaint.

In my opinion all these contentions were erroneous. As to the first, the only plausible foundation for it that can be adduced is, perhaps, a sub-conscious recollection of a rule of the common law of landlord and tenant, namely, that a landlord who claims that a lease has been forfeited waives the forfeiture by subsequent acceptance of rent. It is expressly provided by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 16, sub-s. 3, that no such rule shall apply to statutory tenancies, as they are called, under these Acts. The acceptance of rent by the plaintiffs after February 13, 1945 when notice to quit was given, clearly created no new tenancy, and, as s. 16, sub-s. 3, says, the payment is only to be treated as mesne profits. The defendant relied on *Read* v. *Gordon* (1), where it was held that a new tenancy had been created with a man who had been in the employment of the landlord, and remained in possession after his employment terminated. That was a totally different case. The employers had given up their business in 1934, and, having then no employees, but owning the house of which the defendant had been in occupation as an employee, they let him stay on for some six or seven years at the old rent. They had clearly altered their function from that of owners of a business providing a house for a workman, to owners of house property letting a house to a tenant.

The second proposition, that at the material time Schuler was not a person engaged in the whole-time occupation of the plaintiffs, is slightly more difficult by reason of the ambiguity of the words in sch. I. (*g*) "engaged in his whole-time employment." The equivalent words in s. 1, sub-s. 3, of the Act of 1915, were "some other person in his employ." In s. 5, sub-s. 1 (*d*) of the Act of 1920, they were "some person in his whole-time employment." In *Rex* v. *Rogers* (2) a Divisional Court had to consider the effect of the above words in the Act of 1915. A farmer had dismissed a foreman and given him notice to quit the house he had lived in. He wanted, and could get, a new foreman, but the new man could only start work for him when the house was available. The justices, moved by common sense and a consideration of the policy of the section, made an order for possession. The Divisional Court, I am sure

(1) [1941] 1 K. B. 495.

(2) [1918] W. N. 128.

reluctantly, over-ruled them, being constrained to hold that the prospective new foreman was not "some other person in his "employ." An almost exactly similar case was that of *Spencer* v. *Fox* (1) construing the words in s. 5, sub-s. 1 (*d*) of the Act of 1920 "some person in his whole-time employ-"ment." The justices had made a similar common sense order for possession. The Divisional Court, with expressed reluctance, over-ruled them, being constrained to hold that the new employee, wishing to start work directly the cottage was available for him, was not at the material time a person "in the "whole-time employment" of the landlord.

The words in sch. I. (*g*) to the Act of 1933 are "some person "engaged in his whole-time employment." The word "engaged" is deplorably ambiguous. An employer "engages" a servant when he makes an agreement with him for his services. A workman is "engaged" on work when he is actually carrying it out. In fact, "engage" of a master has an entirely different meaning to "engaged in" of a workman. In the phrase we are concerned with the use is of the workman. I do not find it necessary to express a final opinion on the point, but I am inclined to think that it was not until April 16, 1945, that Schuler became a person "engaged in" the whole-time employment of the plaintiffs, however obvious it may be that the plaintiffs had "engaged" him long before that date. It is unnecessary to decide the point because it would only avail the defendant if he is right in his contention that the material time to consider is the date of the issue of the plaint, March 20, 1945. But I think that the material date is May 2, when the case was heard by the judge, and Schuler had then been "engaged" since April 16. Normally, no doubt, a plaintiff's cause of action must exist at the date of his writ or plaint. The plaintiffs' cause of action is a claim to the possession of their freehold against a tenant who has received due notice to quit. That cause of action existed on March 20. The Rent Restrictions Acts do not forbid the bringing of an action; they only prohibit the granting of certain relief to which the common law would entitle the plaintiff, unless certain conditions have been fulfilled. The question whether those conditions exist must be determined when the question whether the relief claimed may be granted has to be decided, namely, at the hearing of the action.

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(1) [1922] W. N. 141, 142; 91 L. J. (K. B.) 929, 930.

The defendant again relied on *Read* v. *Gordon* (1). In that case the Court of Appeal held that the crucial time for deciding the question then in issue was the date of the notice to quit, and the defendant seeks to infer that the crucial time for deciding all questions under these Acts is the date of the notice to quit or of the plaint. That is an entire fallacy. According to the headnote to that case, the question was whether the tenant was " in the employment of the landlord or a former " landlord, and the dwelling-house was let to him in conse" quence of that employment." The plaintiffs sought to rely on the nature of the tenancy of the defendant, created some thirty years ago, and terminated some six or seven years ago. It was necessary to consider what was the nature of the defendant's tenancy when the plaintiffs' common law claim to possession arose, namely, when they served notice to quit. It provides no support whatever for the third proposition of the defendant.

In the result this appeal must be dismissed with costs. I arrive at the result with the more satisfaction because the defendant's appeal is entirely without merits. It has added something to the windfall of adverse possession that the Acts have already given him, while it has lengthened that separation of Schuler from his wife of which justice would seem to call for the termination.

SCOTT L.J. I agree with the judgment of MacKinnon L.J., and with that of Morton L.J.

MORTON L.J. (read by SCOTT L.J.). The county court judge on May 2, 1945, had to arrive at a conclusion on five questions : (i.) Is it reasonable to make an order for possession ; (ii.) Is this house reasonably required by the plaintiff company for occupation as a residence for some person engaged in its whole-time employment ; (iii.) Was the defendant in the employment of the plaintiff company ; (iv.) Was the house let to the defendant in consequence of that employment ; (v.) Has the defendant ceased to be in that employment. These questions arise under s. 3, sub-s. 1 (*a*) of the Act of 1933, and para. (*g*) of sch. I. to that Act. I have been careful to use in each case the same tense as that which appears in the statute because a great deal of the argument turned upon the date at which these questions must be considered. In my judgment, in answering the first two questions, the judge must have regard to the circumstances

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(1) [1941] 1 K. B. 495.

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existing at the time when he hears the case, while for the purpose of answering questions (iii.) and (iv.) he must look back into the past. The judge answered question (i.) "Yes," and I cordially agree with him. I find it difficult to imagine a case in which it would be more reasonable to make an order for possession. As to question (ii.) it is well settled that the words "is reasonably required" in para. (*g*) of sch. I. to the Act refer to the date of the hearing, see *Nevile* v. *Hardy* (1), a decision on the same phrase as it appears in the Act of 1920. I see no reason why the words which follow "engaged in his whole-time "employment" should refer to any other date. That being so the judge was right in answering question (ii.) in the affirmative, as there is no doubt that Schuler was engaged in the whole-time employment of the plaintiffs from April 16, 1945, onwards. It is unnecessary therefore, to decide whether he answered this description at an earlier date, but I think that he did not, for the reasons stated by MacKinnon L.J. It seems to me that from February to April, 1945, Schuler had been engaged *for* whole-time employment in the future by the plaintiffs, but was engaged *in* the whole-time employment of other persons. I disregard the words in sch. I. (*g*) "or with whom, conditional "on housing accommodation being provided, a contract for "such employment has been entered into," because it has not been proved in the present case that a contract for employment was entered into with Schuler conditional on housing accommodation being provided. As to question (iii.) there can be no doubt that the defendant was in the employment of the plaintiff company for some years, up to December 13, 1944. Therefore the answer to this question must be "yes."

As to question (iv.), it was stated by this court in *Read* v. *Gordon* (2) that the crucial time at which this question must be decided is the date of the notice to quit. In my view the question which has to be decided, as at that time, may be accurately stated as follows: Was the tenancy, which was determined by the notice to quit, a tenancy which had been granted to the tenant in consequence of his employment by the landlord? In *Read* v. *Gordon* (2) this court took the view that the tenancy which was determined by the notice to quit was a new tenancy, which had not been granted in consequence of the tenant's employment by the landlord. Counsel for the defendant argued that the evidence in the present case led to the same conclusion, but I do not accept that argument. It is

(1) [1921] 1 Ch. 404, 407.

(2) [1941] 1 K. B. 495, 505.

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true that the plaintiff company continued to accept the rent of 10*s*. a week from the defendant after his employment had ceased, but I can see no good ground for holding that a new tenancy was thereby created. In my view the rent continued to be paid under the tenancy created in 1941, and there can be no doubt that that tenancy was granted to the defendant in consequence of his employment by the plaintiff company. Thus the tenancy which was determined by the notice to quit was a tenancy granted to the defendant in consequence of his employment by the plaintiff company and question (iv.) must be answered in the affirmative.

As to question (v.) there can be no doubt the defendant had ceased to be in the employment of the plaintiff company before the county court judge heard the case. I incline to the view that this is the relevant date, but it is unnecessary to decide the point, as that employment had ceased before the date of the notice to quit, and, of course, before the present proceedings were commenced.

The result is that all the conditions laid down by the Act of 1933 were fulfilled in the present case, and the county court judge rightly made an order for possession. I agree that the appeal must be dismissed with costs.

Solicitors for defendant: *Churchill, Clapham & Co.*
Solicitors for plaintiffs: *Bulcraig & Davis.*

W. L. L. B.

HILTON *v.* SUTTON STEAM LAUNDRY.

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July 20, 23.
Lord Greene M.R., du Parcq and Morton L.JJ.

Administration—Action by administrator—Writ issued by administrator before grant of letters of administration—Claim under Fatal Accidents Acts—Title of plaintiff to sue—No relation back—Application to amend writ by suing in individual capacity as dependant—Limitation of time for bringing proceedings—Amendment not allowed—R. S. C. Or. 3, *r.* 4—*Fatal Accidents Act,* 1846 (9 & 10 *Vict., c.* 93), *s.* 3—*Fatal Accidents Act,* 1864 (27 & 28 *Vict., c.* 95), *s.* 1.

The plaintiff, who was the sole dependant of her deceased husband, brought an action in an administrative capacity for damages under the Fatal Accidents Acts in respect of his death by accident. She had not at the time when the writ was issued taken out letters of administration:—

Held:—(1.) applying *Ingall* v. *Moran* [1944] K. B. 160, that the writ was a nullity and was not validated by the subsequent

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grant of administration ; and (2.) that, although the action could have been brought by the plaintiff as sole dependant in a personal capacity with the same result, the court could not allow an amendment of the writ and statement of claim, more than a year after the husband's death, so as to convert the action into one brought by the plaintiff in her personal capacity. To allow such an amendment would deprive the defendants of the benefit of the time limit fixed for bringing an action under the Fatal Accidents Acts by s. 3 of the Act of 1846, which prevented the plaintiff from commencing a new action in a personal capacity.

APPEAL from Birkett J.

On October 29, 1942, the plaintiff's husband died as the result of an accident to him while employed on the defendants' premises, and on February 19, 1943, the plaintiff, Emily Rose Hilton, issued a writ as administatrix of the deceased's estate, claiming " damages against the defendants for negligence and " breach of statutory duty pursuant to the provisions of the " Fatal Accidents Acts and the Law Reform (Miscellaneous " Provisions) Act, 1934." She delivered a statement of claim on March 15, 1943, and para. 1 was as follows : " The plaintiff " who is the widow of Frank John Hilton deceased, brings this " action as administratrix of the deceased's estate for the " benefit of such estate under the Law Reform (Miscellaneous " Provisions) Act, 1934, and for the benefit of herself the sole " dependant of the deceased who has suffered damage by reason " of the death of the deceased under the Fatal Accidents Acts, " 1846-1908."

At the time of the issue of the writ and the delivery of the statement of claim the plaintiff had not obtained a grant of letters of administration, which were only granted on October 22, 1943.

On December 10, 1943, it was decided in *Ingall* v. *Moran* (1) that an action brought by a plaintiff under the Law Reform (Miscellaneous Provisions) Act, 1934, claiming to sue in a representative capacity as administratrix of her son's estate before letters of administration had been taken out, was incompetent and that the doctrine of the relation back of an administrator's title to the intestate's death could not be relied on. If this applied, a new action could not be brought under the Fatal Accidents Acts because the period of twelve months from the date of the death, limited by s. 3 of the Act of 1846 for the bringing of a claim under those Acts, had expired. The plaintiff therefore applied for leave to amend the writ and statement of claim by striking out the claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and varying the claim under the Fatal Accidents Acts, so as to make it a claim by the plaintiff in a personal capacity. The master refused leave and Birkett J. affirmed his decision. The plaintiff appealed.

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(1) [1944] K. B. 160.

C. L. Henderson K.C. and *B. M. Goodman* for the plaintiff. A joinder of claims by or against an executor or administrator with claims by or against him personally is permitted by Or. 18, r. 5, and Or. 3, r. 4, makes it necessary to say if a claim is made in an administrative capacity. Further by Or. 16, r. 11, no cause or matter is to be defeated by reason of the misjoinder or non-joinder of parties. While the writ only made a claim in an administrative capacity the statement of claim only made a claim in an administrative capacity so far as the Law Reform (Miscellaneous Provisions) Act, 1934, was concerned and in view of the decision in *Ingall* v. *Moran* (1) that claim is void because the plaintiff had not taken out letters of administration. But the claim under the Fatal Accidents Acts could be brought by an executor or administrator or by the dependants in a personal capacity in cases within the Fatal Accidents Act, 1864, s. 1. That enabled the plaintiff to sue in a personal capacity as sole dependant and that was done by the statement of claim on its true construction. [They referred to *In re Richardson* (2).] Order 70, rr. 1 and 2, make it clear that non-compliance with rules does not render a proceeding void unless the court so directs. Under r. 2, any application to set aside a writ must be made within a reasonable time. Here the defendants became aware of the irregularity when they were told that the plaintiff had no grant of administration. They could have applied to strike out the claim in the statement of claim but waited a year and took part in interlocutory proceedings.

If this view of the construction of the statement of claim is wrong and the proceedings under the Fatal Accidents Acts are brought in a representative capacity, the court ought to allow the amendment asked for. There is special ground for allowing the amendment seeing that an action under these Acts has the same result whether the plaintiff sues in an administrative or a personal capacity. It is only the limitation of the time for

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(1) [1944] K. B. 160.

(2) [1933] W. N. 90.

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bringing actions under these Acts to one year from the death that prevents the plaintiff from beginning a new action in a personal capacity. As to the propriety of the amendments see Or. 16, r. 11 and *Mabro* v. *Eagle, Star & British Dominions Insurance Co.* (1).

The case is distinguishable from *Ingall* v. *Moran* (2) which related only to an action under the Law Reform (Miscellaneous Provisions) Act, 1934.

Beney K.C. and *T. F. Davis* for the defendants. Admittedly the writ was issued by the plaintiff in a representative capacity and Or. 3, r. 4, makes it necessary for the capacity to be stated. The statement of claim is on its true construction an action in the same capacity; see para. 1 and the form of claim. There is nothing to indicate a personal claim. The action therefore is a nullity on the authority of *Ingall* v. *Moran* (2) which must be applied to an action under the Fatal Accidents Acts equally with one under the Law Reform (Miscellaneous Provisions) Act, 1934. The action was born dead and cannot be revived. The amendments sought would deprive the defendants of the benefit of the limitation in time for the bringing of actions imposed by the Fatal Accidents Act, 1846, s. 3. It is well settled that nothing will be done by the court to deprive a defendant of the benefit of any statute of limitations.

LORD GREENE M.R. This is an unfortunate case. The plaintiff is the widow and, as she alleges, no doubt correctly, the sole dependant of her deceased husband, who died as the result of an accident on October 29, 1942. The result therefore is that the period of twelve months allowed for the bringing of a claim under the Fatal Accidents Act began to run on that day. On February 19, 1943, that is, about five months after the death she issued a writ. On the face of the writ she is described merely as a widow, but the endorsement is in the following terms: "The plaintiff claims as administratrix of Frank John "Hilton deceased, for damages for negligence and breach of "statutory duty pursuant to the provisions of the Fatal "Accidents Acts and the Law Reform (Miscellaneous Provi-"sions) Act, 1934." That, of course, on its face, raises two quite separate causes of action, which have a fundamental difference. A claim under the Law Reform (Miscellaneous Provisions) Act, 1934, is a claim for the benefit of the estate; the money recovered falls into the estate and is subject to the will,

(1) [1932] 1 K. B. 485.

(2) [1944] K. B. 160.

if any, of the deceased person and to the claims of his creditors. A claim under the Fatal Accidents Acts, on the other hand, has this difference, that the money recovered, in a case like the present, where there is only one dependant, will go to the dependant whether the action is brought by the personal representative of the deceased or by the dependant in her personal capacity. Under the Act of 1846 the person to bring the action was the legal personal representative, not for the benefit of the estate but for the benefit of the dependants, and, by the amending Act of 1864, a dependant was entitled to bring an action in cases where there was no personal representative, or, if there was one, the personal representative failed to begin proceedings within six months. Whichever is the form of action the result is precisely the same, because the money recovered does not form part of the estate of the deceased person, but goes, as through a conduit pipe, to the dependants who are entitled.

If the plaintiff had in fact held letters of administration at the date of this writ, no difficulty would have arisen. She delivered a statement of claim on March 15, 1943, and it is argued on her behalf that, on the true construction of that statement of claim, she has shifted her ground, as regards the claim under the Fatal Accidents Act, by claiming under that Act in her personal capacity and not in a representative capacity. So far as the claim under the Law Reform Act is concerned, it is not suggested, and of course it could not be suggested, that her claim was otherwise than in her alleged capacity as administratrix. In my opinion the statement of claim as regards the claim under the Fatal Accidents Act does not bear the interpretation suggested. The statement of claim follows the writ, and in respect of both Acts the claim under para. 1 purports to be made in a representative capacity. I should have thought, reading that paragraph as a piece of English, that the words " as administratrix of the deceased's estate " cover both limbs of the claim, each limb introduced by the words " for the benefit " of " : in the one case, " for the benefit of the estate," and, in the other case, for the benefit of herself as sole dependant. That seems to me to be the natural construction of the words. It is argued that the words " as administratrix of the deceased's " estate " must be confined to the claim under the Law Reform Act. I do not so read the paragraph. When the rest of the statement of claim, so far as is relevant, is looked at she gives, the particulars pursuant to the Fatal Accidents Act, which she is bound to do under the statute : name of the person on whose

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behalf the action is brought, Emily Rose Hilton, widow of the deceased, and then in her own prayer she claims damages. (1.) under the Fatal Accidents Act, and (2.) under the Law Reform Act, not distinguishing in any way the alleged two different capacities. I think, therefore, that the statement of claim must be read in the way I have indicated.

The statement of claim having been delivered on March 15, 1943, on May 17, 1943, the defendants' solicitors wrote a letter to the plaintiff's solicitors acknowledging a letter from the latter; in which they said that no letters of administration had been taken out as the value of the estate was under 100*l.* The defendants' solicitors then asked whether the plaintiff in those circumstances was entitled to sue as administratrix. Her solicitors considered the point, and on July 27, having taken the advice of counsel, they wrote saying that it would be necessary for the plaintiff to take out letters of administration and suggesting that the action should be stayed pending the obtaining of the grant. It would appear from that letter that the solicitors were under the impression that, notwithstanding the lack of letters of administration when the writ was issued, a subsequent grant for which they were proposing to apply, would in some way operate retrospectively so as to validate the writ. Indeed there was, I think, current in some quarters a belief that that was the law, that a subsequent grant would validate a writ which had been issued in the alleged capacity of administratrix so that the writ became a good writ ab initio. The solicitors in fact obtained for the plaintiff a grant of administration on October 22, that is to say, a week before the expiration of the statutory period of twelve months within which an action under the Fatal Accidents Act had to be brought. On October 26, 27 and 28, a case was argued in this court and judgment was delivered on December 10, that is to say, after the expiration of the twelve months. That was a case of *Ingall* v. *Moran* (1), where the plaintiff was claiming under the Law Reform (Miscellaneous Provisions) Act, 1934, and based his claim upon his alleged representative capacity as administrator. At the date when the writ was issued no letters of administration had been taken out and they were not taken out until two months later. The question before this court was whether, in those circumstances, the action was competent, and it was held that it was not: that the subsequent grant of letters of administration did not operate retroactively to validate the original writ, which, from the beginning, was a nullity. If the principles there laid down are applicable to this case it would mean that the original writ here was a nullity and could not be validated by anything that happened afterwards, either by the alleged new basis on which the statement of claim is said to have been framed, or by the grant of letters of administration, or by any order of the court under any of the rules of court, on the ground that it was a mere irregularity. It is said that the principles of *Ingall* v. *Moran* (1) do not apply, but before considering briefly the arguments, I must say a word about the actual nature of this appeal. It is an appeal from an order of Birkett J. confirming an order of the master, who refused the plaintiff's application for leave to amend her writ and statement of claim. The nature of the amendments asked for was this. In the writ the plaintiff sought to strike out the words " as administratrix of the estate " of Frank John Hilton deceased " and the reference to the Law Reform Act. I can get rid of the Law Reform point at once by saying that, so far as the claim under the Law Reform Act is concerned, it seems to me, and, indeed, the contrary is not suggested, that *Ingall* v. *Moran* (1) completely covers the case for the very simple reason that the decision related to a claim under the Law Reform Act, which is a claim for the benefit of the estate. Looked at, therefore, as a claim under the Law Reform Act, this action was bound to fail for the reason that no letters of administration had been granted when the writ was issued. It was therefore desired to lighten the ship by striking out the claim under the Law Reform Act. But the intention of the rest of the amendment of the writ which was sought for clearly was to get rid of the allegation of the representative capacity of the plaintiff, and leave the writ as a writ issued by her, not as administratrix but in her personal capacity, pursuant to the power of a dependant under the Fatal Accidents Act, 1864, to bring an action in his or her name. In the statement of claim consequential amendments are sought by getting rid of the claim under the Law Reform Act, and by getting rid of the reference in para. 1 of the statement of claim to the allegation that she was bringing the action as administratrix, leaving the statement of claim quite clearly on its face a claim in an action by her in her individual capacity.

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The substantial question we have to decide is whether or not those amendments will have the effect of altering the position of the defendants in the action for the worse with regard to the

(1) [1944] K. B. 160.

statutory period of limitation laid down in the Fatal Accidents Acts. It was suggested that if the action went to trial on the writ and pleadings unamended it would still be open to the plaintiff to argue before the trial judge that the misdescription was a mere technicality which could be remedied by a special order of the court under the rules. It was not desired to leave matters in that shape, and it was thought convenient to test the position by applying now for leave to amend. If the leave to amend was refused, the position of the plaintiff would be that she could either go on in the hope of getting the irregularity, if that is all it is, forgiven by the court at the hearing, or she could save herself the expense of continuing with an action which must necessarily fail. Supposing that this amendment is not allowed, and the action proceeds to trial as it now stands, will it necessarily fail? If the principles laid down in *Ingall* v. *Moran* (1) apply to the claim under the Fatal Accidents Act, as they unquestionably apply to the claim under the Law Reform Act, the answer to that question must be that the action will fail. If the amendment is allowed, the action will not fail on that ground, although, of course, it may fail on the merits. The result, therefore, will be that if we allow the amendment we shall be prejudicing the position of the defendants, who are, as things stand, in the position to argue that the plaintiff's case is irreparably lost because the action she had brought is incompetent, and will enable the plaintiff to set the action on its feet. Further, if the action is incompetent the plaintiff can do nothing, because the time for launching a new competent action has elapsed. If then we allow this amendment, the defendants will, in that respect, be prejudiced because they will obtain no benefit from the limitation period laid down by the statute. It is, however, very well settled that the court does not allow amendments having the effect of depriving a defendant of a defence under any statute of limitations, and that will be the very effect of allowing this amendment if the principles to which I have referred, laid down by this court in *Ingall* v. *Moran* (1) are applicable to the case. There is only one ground of distinction which has been suggested to us as differentiating this case from that. It is pointed out, correctly, that in that case the only claim involved, and the only claim that could be brought, was a claim by the personal representative of the deceased, because the benefit of the claim, if it was made good, would enure to the benefit of the estate. It is then

(1) [1944] K. B. 160.

pointed out that here the position is different: that there is no difference of substance between a claim under the Fatal Accidents Act by a personal representative and a claim by a dependant in his or her personal capacity. In either case, it is said that the cause of action is precisely the same although the statute enables two different classes of persons to sue: the beneficiaries of the judgment if obtained would be the same; the estate of the deceased is not concerned in the matter, and the personal representative was only brought in as the person to sue under the original Act as a matter of convenience and not as a matter of substance.

I should not be averse to discovering any proper distinction which would enable this unfortunate slip to be corrected. Apart from the fact that the solicitors for the defendants in fairness pointed out the difficulty, there appear to me to be no merits on their side. But the statute of limitations is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations is entitled, of course, to insist on his strict rights. He is similarly entitled to insist on the strict application of the rule that the court will not deprive him of those rights by allowing amendments in pleadings. In this case it seems to me that, to allow this amendment would be to deprive the defendants of the benefit of the statute by setting the action on its feet again, and, in effect, validating ab initio the original representative writ. The distinction suggested between this case and the earlier one is one which, in my opinion, does not produce the result suggested. It is perfectly true that the result is the same whether an action under the Acts is brought by the personal representative or by the dependants. It does not alter the fact that the action, looked at technically, is an action in different capacities, and the capacity in which it is brought must, under Or. 3, r. 4, be stated in the endorsement on the writ. That was done in this case and the plaintiff bound herself to an action in a representative capacity which she did not possess, and, unfortunately, she must take the consequences. In the result, sorry though I am, and sorry as Birkett J. was, to be compelled to come to this conclusion, the appeal in my opinion must be dismissed with costs.

DU PARCQ L.J. I agree. I think there is no mistake in the conclusion to which the learned judge came. I agree with the reasons given by my Lord, and I have nothing to add.

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MORTON L.J. I also agree, and I share the regret which is felt by the other members of the court.

Appeal dismissed.

Solicitors: *Eland, Nettleship & Butt; Simmons & Simmons.*

H. C. G.

C. C. A.

1945 *Oct.* 16, 20.

Wrottesley, Stable and Lynskey JJ.

REX *v.* JARMAIN.

Criminal law—Murder—Robbery—Pointing loaded and cocked pistol to intimidate—Inadvertent pressure of trigger.

The accused, engaged in robbery in the office of a garage, after endeavouring to frighten the cashier, who was counting the day's takings, pointed a loaded and cocked Browning automatic pistol at her. In giving evidence he said that since the cashier had treated him with scorn he did not know what to do, and that " he was thinking what to do when the gun went off." He had not, he asserted, intended to press the trigger. The cashier fell wounded and the accused grabbing some of the cash, escaped. The cashier died of her wounds. At the trial the judge directed the jury that since the accused, by his own evidence, was engaged in an unlawful and dangerous act which amounted to a felony, even if he had pressed the trigger inadvertently, that was murder. The accused was convicted of that crime. On appeal it was contended for the appellant that inadvertence in the doing of the act which causes death is always a defence to a charge of murder and, accordingly, that the trial judge had misdirected the jury :—

Held, that there was no misdirection ; that a person who uses violent measures in the commission of a felony, involving personal violence, does so at his own risk and is guilty of murder if those violent measures result, even inadvertently, in the death of the victim.

Director of Public Prosecutions v. *Beard* [1920] A. C. 479 applied.

APPEAL against conviction for murder.

Peter Joseph Jarmain purchased a Browning automatic pistol of Belgian manufacture for the purpose of committing armed robbery. When the magazine of this pistol is filled, to fire it, the safety catch is released, the magazine engaged (an action which places a round in the chamber and is known as " cocking ") and the trigger pressed. Between 5.30 and 6 p.m. on June 28, 1945, Jarmain entered the office of the Red Arrow Garage at Thornton Heath, holding the pistol with its loaded magazine in his right hand as he passed through the doorway. He found Mrs. Ivy May Phillips, a cashier, counting the day's takings, two piles of silver on the top of some notes being in front of her. Jarmain, according to his statement to the police and his evidence, pointed the pistol in his right hand at her saying: "I'll have that, sister." Mrs. Phillips continued to write for some moments, then put down the pen, looked at him and said: "Don't be silly." Jarmain, the safety catch being released, cocked the pistol but then ejected the round from the chamber. This he did, he said, to frighten her. Jarmain then re-cocked the gun and took it in his left hand saying: "This ain't no toy." Mrs. Phillips said: "Don't be absurd." Jarmain, in evidence said that though he kept the loaded pistol in his left hand, pointed at Mrs. Phillips to frighten her, she had treated him with scorn and he did not know what to do, "that he was "thinking what to do, when the gun went off"; and that he had not intended to press the trigger. Mrs. Phillips fell to the ground mortally wounded and died on June 30. Jarmain, having grabbed some of the notes, made his escape.

At the trial at the Central Criminal Court Charles J. in the course of his summing-up, said: "It has been laid down many "times by myself and other judges, and as recently as three "years ago, that where an act which a person is engaged in "performing is unlawful, then if, at the same time, it is a "dangerous act, that is, an act which is likely to injure another "person, and quite inadvertently the doer of that act causes "the death of another person, then he is guilty of manslaughter. "Now, that is if the act is unlawful, but if, in doing that same "dangerous and unlawful act, he is doing an act which amounts "to a felony, he is guilty of murder and not manslaughter. "Such are the general terms of the law. Let me apply them, "if I may, to the circumstances of this case. This man was "by all admissions, by his own sworn testimony, engaged upon "an armed robbery, and that is a felony . . . . and in the "course of that armed felony this unfortunate young woman "met her death at his hands. You have been invited to say "that there was a sort of break, that is to say that when this "woman refused to be cowed by the exhibition of this loaded "and cocked revolver, this man was so bewildered with her "bravery that he forgot and set aside the execution of the "felony for which he had entered the garage, and that while "momentarily, almost, he was in that condition of mind he "inadvertently, he knows not how, squeezed the trigger and "killed the woman, or injured her so that she died a little time "afterwards. I find difficulty in directing you that you can "consider any such proposition." In another passage, he said: "And so it is that, on the testimony before you in this "case, it is my bounden duty . . . . to tell you that he went "to execute an armed robbery, which is a felony, and that in "the execution of that armed robbery, which he carried out "to its absolute completion by taking the money which he "went there to get with the assistance of the revolver, he was "doing that which was a dangerous act and an unlawful act "holding a loaded cocked revolver with his finger on the trigger "in the direction of that woman, while he was executing a "felony and as part of it. It may well be that he did not "intend or desire that revolver to go off. I have to tell you "in law that that does not make any difference; if you accept "the circumstances under which this terrible killing took place, "that is murder." Finally, he said: "You will remember the "statement that he made, which does not vary from what he "said" (in the witness box). "He simply said that he passed "the revolver from his right hand to his left hand; he knew "that it was cocked; he knew it was loaded, and he held it in "his left hand pointing as he knew—and he says he knew— "towards the woman, and that it went off inadvertently, "If all that be true, then I am bound to direct you that that is "murder and not manslaughter." The jury found the appellant guilty of murder. Counsel for the accused had invited the jury to find that the accused had pressed the trigger inadvertently, but the jury did not indicate whether or not in their view the pistol had been fired inadvertently.

Jarmain appealed.

F. H. Lawton for the appellant. In view of the evidence and the summing-up it must be assumed that the jury may have taken the view that the appellant pulled the trigger inadvertently. Charles J. misdirected the jury in his summing-up. Inadvertence in the doing of the act which causes the death is always a defence to a charge of murder. As Viscount Sankey L.C. said in *Woolmington* v. *Director of Public Prosecutions* (1): "When dealing with a murder case the Crown "must prove (*a*) death as the result of a voluntary act of the "accused, and (*b*) malice of the accused." Bayley J. in *Bromage* v. *Presser* (2) gave his famous definition of malice

(1) [1935] A. C. 462, 482.

(2) (1825) 4 B. & C. 247, 255.

as meaning a wrongful act done intentionally without just cause or excuse. Viscount Sankey L.C. also said in *Woolmington's* case (1): " If at the end of and on the whole of the " case, there is a reasonable doubt created by the evidence " given by either the prosecution or the prisoner as to whether " the prisoner killed the deceased with a malicious intention " the prosecution has not made out the case and the prisoner is " entitled to an acquittal." In *Rex* v. *Beard* (2) the rule laid down by the Court of Criminal Appeal was solely with regard to the issue of malice. it did not touch the proposition that to prove a charge of murder the prosecution must show that the act of the accused in killing the deceased must be voluntary and not accidental. Misadventure cannot result in murder. In *Director of Public Prosecutions* v. *Beard* (3) the act of ravishing the girl and the covering of the girl's mouth and the pressure applied to her throat were voluntary acts : they were intentional and not accidental. The result of the last two acts was that the girl died of suffocation. That result was not intended, yet the acts themselves were intentional and voluntary and the death was the accidental consequence of the voluntary acts. Viscount Birkenhead L.C., when he said (4) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of rape meant by an " intentional " or " voluntary " act of violence. Charles J., in this case misdirected the jury in that he confused inadvertence as to what the results of the appellant's action might be with inadvertently doing the very act of killing, and he ruled that, in the circumstances proved, the fact that the Browning pistol went off by accident would not prevent the appellant from being guilty of murder. There would appear to be no case in the reports where, when the act causing death was involuntary, a conviction for murder has been upheld. [*Reg.* v. *Greenwood* (5) ; *Reg.* v. *Horsey* (6) ; *Reg.* v. *Vamplew* (7) ; *Reg.* v. *Lee* (8) ; *Reg.* v. *Serné and Another* (9) and *Reg.* v. *Whitmarsh* (10) were cited.

L. A. Byrne for the Crown. In *Woolmington* v. *Director of Public Prosecutions* (11) there was no evidence of a felony with violence, other than that alleged of murder. Viscount Sankey L.C. was there stating the law on the burden of proof in murder cases. In *Director of Public Prosecutions* v. *Beard* (1) the accused placed his hand on the mouth of the girl to stop her screaming and pressed his thumb on her throat, with the result that she died of suffocation. The extra pressure which resulted in the death of the girl was inadvertent and involuntary. There is no distinction in principle between this case and that of *Director of Public Prosecutions* v. *Beard* (1). Charles J., directed the jury in the terms once again laid down by the judgment of this court delivered by Humphreys J., in *Rex* v. *Larkin* (2), that if the accused, in doing a dangerous and illegal act, is doing an act which amounts to a felony, he is guilty of murder. [*Rex* v. *Hedley and Another* (3) and *Rex* v. *Hulton and Jones* (4) were referred to.]

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(1) [1935] A. C. 481.
(2) (1919) 14 Cr. App. R. 110.
(3) [1920] A. C. 479.
(4) Ibid. 493.
(5) (1857) 7 Cox C. C. 404.
(6) (1862) 3 F. & F. 287.
(7) (1862) 3 F. & F. 520.
(8) (1864) 4 F. & F. 63.
(9) (1887) 16 Cox C. C. 311.
(10) (1898) 62 J. P. 711.
(11) [1935] A. C. 462.

F. H. Lawton replied.

WROTTESLEY J. We all agree that the appeal must be dismissed, but we think it well that our reasons should be put into writing.

Oct. 22. WROTTESLEY J. read the written judgment of the court: On behalf of the appellant it is said that in the passages of Charles J.'s summing-up, dealing with the appellant's account of the killing of Mrs. Phillips, which the jury may or may not have believed, but which they were bound to consider, there was misdirection, and that the judge confused inadvertence as to what the results of the appellant's action might be with inadvertence in doing the very act itself, but in its simplest form the careful and clear argument of Mr. Lawton amounted to this, that in order to render himself guilty of murder the appellant must have pressed the trigger voluntarily and not inadvertently, and so fired the pistol. If, therefore, the jury accepted the appellant's evidence that his will did not go with the action of his finger in pressing the trigger he was guilty not of murder but of manslaughter, and that the jury should have been so directed. In the absence of more specific authority, he based his argument on passages in two speeches in the House of Lords. The first passage is to be found in *Woolmington* v. *Director of Public Prosecutions* (1), where Viscount Sankey L.C. said (2): "When dealing with a murder "case, the Crown must prove (*a*) death as the result of a "voluntary act of the accused and (*b*) malice of the accused." In that case the only issue before the House of Lords was the burden of proof. There was no question of a felony with violence; at the highest the alleged facts showed only a misdemeanor. The second passage is from the speech of Viscount Birkenhead L.C., in *Director of Public Prosecutions* v. *Beard*. This is the passage (3): "The first objection failed, "the court being of opinion (apart from the defence of drunken-"ness) that the evidence established that the prisoner killed "the child by an act of violence done in the course or in the "furtherance of the crime of rape, a felony involving violence. "The court held that by the law of England such an act was "murder. No attempt has been made in your Lordships' "House to displace this view of the law and there can be no "doubt as to its soundness." It was argued on behalf of the appellant that this passage must be read with the addition of the word "intentional" or "voluntary" before the words "act of violence." Accordingly, counsel for the appellant claims that if the appellant's evidence is accepted, while it is true that he was engaged in the commission of a crime involving violence, the death of the woman killed was not due to a voluntary violent act performed by the appellant, but to an inadvertent and involuntary act, and the mere fact that the general design was the completion of a crime involving violence was not sufficient to make the killing, which occurred in the course of it, murder.

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(1) [1920] A. C. 479.

(2) (1942) 29 Cr. App. R. 18, 32. This case is reported on other points [1943] K. B. 174.

(3) Court of Criminal Appeal. April 12, 1945. Not reported.

(4) Court of Criminal Appeal. February 19, 1945. Not reported.

On the other hand, Mr. Byrne for the Crown, pointed out that the direction given by the learned judge in this case was practically verbatim the law as it was laid down in this court in *Rex* v. *Larkin* (4). The question, therefore, arises whether the fact that the firing of the pistol was or might have been inadvertent creates an exception to the general rule laid down in that case, based, as it is, on a long line of precedent. In the case of *Director of Public Prosecutions* v. *Beard* (3), Lord Birkenhead L.C. pointed out that in the Court of Criminal

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(1) [1935] A. C. 462.

(2) Ibid. 482.

(3) [1920] A. C. 479, 493.

(4) (1942) 29 Cr. App. R. 18.

Appeal two separate and independent points of misdirection had been raised on behalf of the prisoner (1). The first was that the learned judge should have told the jury that if they were of opinion that the violent act, which was the immediate cause of death, was not intentional, but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter. As the Lord Chancellor pointed out, that objection failed, and it is clear that the House of Lords approved of the decision of the Court of Criminal Appeal in rejecting that objection. As Mr. Byrne pointed out, if the Court of Criminal Appeal were right in that decision, they decided that which is, in principle, indistinguishable from that which arises in this case. In effect, the argument for the appellant here rests on the proposition that you must isolate the pressure of the appellant's finger on the trigger of the pistol from all the surrounding acts and circumstances which made it a deadly thing to do. The act in the performance of which the appellant killed the dead woman was robbery with arms which was compounded of many elements and circumstances. The pistol must be loaded, cocked and presented at the woman, as well as fired, in order that her death might result, and it was admitted that all these elements were present and that all but the last were brought about by his voluntary act. Even if the pistol had never been fired, it is clear that the appellant committed upon this woman a felony involving violence. He even completed the robbery.

The judge was no more under a duty to direct the jury that if the pressing of the trigger was inadvertent the killing was manslaughter, than was the judge in the case of *Beard* (2) under a duty to direct the jury that if the pressure exerted by the appellant in that case voluntarily was only so much as was necessary to silence the child and the extra pressure which throttled her was inadvertent and accidental, that the accused there was guilty of manslaughter. We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim. For this purpose the use of a loaded firearm, in order to frighten the person victimized into submission is a

(1) [1920] A. C. 492. (2) [1920] A. C. 479.

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violent measure. The recent case of *Rex* v. *Hulton and Jones* (1) decided in this court, is clear authority for this proposition.

Appeal dismissed.

Solicitor for appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for Crown: *The Director of Public Prosecutions.*

(1) Court of Criminal Appeal, February 19, 1945. Unreported.

C. G. M.

NATIONAL UNION OF GENERAL AND MUNICIPAL WORKERS *v.* GILLIAN AND OTHERS.

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Oct. 16, 17, 25.
Scott and MacKinnon L.JJ. and Uthwatt J.

Trade union—Registered name—Right to sue in tort—Right to sue for libel—Trade Union Act, 1871 (34 & 35 *Vict., c.* 31)*—Trade Union Amendment Act,* 1876 (39 & 40 *Vict. c.* 22).

A trade union can, in general, maintain an action in tort, and an action for libel is no exception to that rule.

Taff Vale Railway Co. v. *Amalgamated Society of Railway Servants* ([1901] A. C. 426) applied.

Decision of Birkett J., affirmed.

APPEAL from Birkett J.

The plaintiffs, the National Union of General and Municipal Workers, a trade union, brought this action in their registered name, claiming damages for libel against Arthur J. Gillian, the General Secretary of the Chemical Workers' Union, and Bob Edwards, an official of that trade union, in respect of matters contained in a certain circular. They also claimed damages against those defendants and J. W. Brown & Co., a firm of printers, in respect of a libel alleged to be contained in the issue of *The Chemical Worker,* of August, 1944. The defendants having pleaded in their defence that the action was not maintainable at the suit of the plaintiffs, an order was made under Or. 25, r. 2, of the Rules of the Supreme Court, for trial of the issue so raised as a preliminary point of law.

Birkett J., held that the action was maintainable. He was of opinion that the rules of the plaintiff union would have constituted it an unlawful association but for the Trade Union Act, 1871; that the libels complained of would have an adverse effect on the plaintiffs' property by lessening their subscriptions

Reported by R. C. CALBURN, Esq., Barrister-at-Law.

and membership; that, while in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1), the actual point for decision was whether a trade union could be sued, the power of such a union to sue was also under consideration in the House of Lords, so that that case was decisive of the present case; that the Act of 1871 created, in the form of a trade union, a new legal entity, which could sue in its registered name and was not confined to suing for the purposes set out in that Act; that the plaintiffs, as a trade union, had a character which could be defamed; and that the alleged libels constituted imputations on the plaintiff union in its collective name as distinct from the individuals who composed it.

The defendants appealed.

Paull K.C. and *Ryder Richardson* for the defendants. The first question is whether a trade union can sue in tort. A trade union is not a corporation, and up to 1871 was an illegal body. Birkett J., held that the effect of the Trade Union Act, 1871, which validated trade unions, included giving them a right to bring actions for libel. In so far as not validated by the Act, a trade union is still an illegal body: see *Hornby* v. *Close* (2). The Act does not confer the right to sue in tort. If the property of a trade union is tortiously injured the union cannot itself sue; the trustees, in whom its property is vested by s. 8, must do so. *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) where it was held that a trade union could be sued in its own name, is relied on by the plaintiffs, but it is to be noted that the union in that case was resisting, not making, a claim. [*Rigby* v. *Connol* (3) and *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* (4) were also referred to.]

[SCOTT L.J. Has not the legislature created a persona juridica with all the rights of an individual person?] As regards some rights, yes; but not as regards all. The effect of the Act was to free trade unions of their criminal character, and to validate certain agreements; but *Russell* v. *Amalgamated Society of Carpenters and Joiners* (5) shows that, unless there is something in the Act enabling the union to bring an action for libel, it must fail. Its character cannot be injured by a libel as it has no character, being an illegal society. [*Yorkshire Miners' Associa-*

(1) [1901] A. C. 426.
(2) (1867) L. R. 2 Q. B. 153.
(3) (1880) 14 Ch. D. 482, 490.
(4) [1922] 2 A. C. 440.
(5) [1912] A. C. 421, 432, 433.

tion v. *Howden* (1) was referred to.] No doubt a corporation can sue for libel: *Metropolitan Saloon Omnibus Co. Ld.* v. *Hawkins* (2). But that action was maintainable on the ground that the libel injured the plaintiffs' property. The alleged libel in the present case cannot injure the plaintiffs' property. If it has done so, the action is wrongly conceived and should have been brought by the trustees. The union as cestui que trust cannot bring the action unless the trustees refuse to do so, and there is no evidence that they have refused. [*Williams* v. *Beaumont* (3), *Manchester Corporation* v. *Williams* (4) and *South Hetton Coal Co. Ld.* v. *North Eastern News Association Ld.* (5), were also referred to.]

Slade K.C., *Valentine Holmes K.C.*, and *Roche* for the plaintiffs. The questions for decision are really only two, i.e., whether the plaintiffs can sue for tort, and, if so, whether for this libel in particular; for it is submitted that, if a trade union can in general sue in tort, there is no reason for excluding defamation from that rule. Admittedly, the plaintiffs would, but for the Act of 1871, be an unlawful association as being in restraint of trade, but they would not have been found guilty of a criminal conspiracy. The Act creating trade unions has created a new legal entity with all the rights of an ordinary person, save such rights as are expressly excepted. That entity does not have only the rights expressly granted to it; it has all rights, save such as are expressly or impliedly withheld by the Act. It is significant that s. 4 of the Act of 1871 provides that nothing in the Act is to enable any court to entertain any legal proceeding having as its object the enforcing, or recovering damages for the breach of, certain agreements, whereas the Act nowhere prohibits the institution of legal proceedings for tort. [The speech of Lord Atkinson in *Russell* v. *Amalgamated Society of Carpenters and Joiners* (6) was referred to.]

It is submitted that *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (7) is both applicable to and conclusive of this case. The Trade Union Act, 1906, which provides that an action against a trade union for tort is not to be entertained by any court in no way affects its right to bring an action for tort. On this question reference may be made to the speeches of Lord Haldane L.C., Lord Atkinson and

(1) [1905] A. C. 256.
(2) (1859) 4 H. & N. 87.
(3) (1833) 10 Bing. 260.
(4) [1891] 1 Q. B. 94.
(5) [1894] 1 Q. B. 133.
(6) [1912] A. C. 421, 430.
(7) [1901] A. C. 426.

Lord Moulton in *Vacher & Sons, Ld.* v. *London Society of Compositors* (1). It is further submitted that the trustees of the plaintiff union cannot be the proper persons to sue here, as is argued for the defendants, because a libel on the union might not be a libel on them. Finally, it would seem unarguable that the plaintiffs cannot sue for the libel alleged in this case.

[They were stopped.]

Paull K.C. replied.

Cur. adv. vult.

The following judgments were read.

Oct. 25. SCOTT L.J. This case is in reality a battle between two trade unions. The defendants are officers of the Chemical Workers' Union. They appeal from the decision of Birkett J., who held that an action for libel brought against them by the plaintiff union is competent, and ought not to be dismissed in limine under Or. 25, r. 2, of the Rules of the Supreme Court. By leave of this court the plaintiffs added to their statement of claim a reference to their book of rules. The defendants' contention below and before us is that a trade union registered under the Trade Union Acts has no right in law to bring any action for tort. I agree so completely with the reserved judgment of Birkett J., that I should have been content to adopt it as my own but for the far-reaching importance of the legal questions at issue and the careful argument of Mr. Paull. He invited us to say "No" to each of these questions: (1.) Can any trade union sue in respect of any tort?; (2.) if, generally, it can, can it sue for a libel?; (3.) if in some cases some trade union may be at liberty so to sue, can the plaintiff union sue for the libels set forth in the statement of claim? I will discuss these three questions in that order.

(1.) All the Trade Union Acts, from 1871 to 1927, are, according to their terms, to be read as one, but the only two that are directly relevant are those of 1871 and 1876, although s. 4 of the Trade Disputes Act, 1906, which prohibits actions for tort against trade unions, may have some indirect relevance. Mr. Paull points out, justly, that a registered trade union as defined by s. 16 of the Amendment Act of 1876 is neither a natural person nor a corporation, and he contends that, because it is neither of those, it can have no powers, and indeed no existence, except what may have been conferred in express terms by Parliament in the relevant statutes affecting registered trade unions. That argument is, however, fallacious. There is a tertium quid. A trade union has many activities; it has some existence, and it is something. The omission of Parliament to christen it with some new generic name is immaterial, for Parliament has absolute sovereignty and can make new legal creatures if it likes. It is able, for instance, to create a persona juridica not previously known to the law, if it so chooses, or to clothe an existing association of natural persons with what may be called co-operative personality so as to give it the status of a persona juridica. In my view that is just what it did in 1871. It expressly assumed the possession by every trade union, when duly registered, of so many of the main attributes of judicial personality that I find any other inference of the intention of Parliament impossible.

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(1) [1913] A. C. 107, 113, 120, 127.

First of all, the primary object of the legislation was to validate and encourage the exercise by trade unions of a whole group of industrial functions with a view to the establishment and maintenance of good relations between employers and employed, an object of fundamental public importance to the United Kingdom, which was in 1871 the leading industrial nation of the world. The functions in question are those which fall under the general head of collective bargaining; and in construing trade-union legislation it should never be forgotten that trade unions might consist only of employers, only of employees, or of both combined, for all three types of association might be, and often were, directed to the unlawful restraints of trade, which the legislation was intended to validate.

Secondly, the legislation contains many specific examples of attributes of legal personality expressly conferred on the trade unions thereby legalized, for example:—(1.) the right to own property—only nominally vested in trustees: see s. 8 of the Act of 1871, "All real and personal estate whatsoever "belonging to any trade union registered," etc.; (2.) the right to register an identifying name, and to change it; (3.) the right to amalgamate with another trade union; (4.) the right to dissolve itself by appropriate machinery; (5.) the right to bring or defend actions in the name of the trustees, the cestui que trust being ex hypothesi a person—to wit, the trade union itself (s. 9); (6.) the right to hold its treasurer to account (s. 11); (7.) the right to have complaints made on its behalf before a court of summary jurisdiction (s. 12). These illustrations from the Act of 1871 are, in my opinion, conclusive of the intention of Parliament to attribute legal personality to trade

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unions, and that quality or characteristic must of necessity connote the general power to act, or, in other words, to do at any rate many of those things which are inherent in the legal concept of personality.

That being the character of the legislation, I can see no prima facie ground for limiting by any implication the list of powers normally attendant on legal personality. On the contrary, it is for those who contend for a limiting interpretation to state the reasons for that view. The main, if not the only, reason advanced by Mr. Paull is that a trade union was an unlawful association at common law. That proposition is broadly correct, but his conclusion does not follow, that the legalized trade union of the Acts can only do those things which the Acts specifically authorize. It rests on a fallacy. In my view, the true interpretation of the Acts is that a trade union is given all powers of a persona juridica except (*a*) those solely characteristic of a natural person, and (*b*) those which are expressly excepted by the creating or enabling statute. This conclusion is strongly supported by a consideration of what must have been in the mind of Parliament. The policy of the Act was to encourage collective bargaining by legalizing the position of trade associations formed for purposes which, taken alone, were obnoxious to the common law as being in restraint of trade. The main feature of collective bargaining is to collect the members on each bargaining side into coherent units which can speak or make agreements for the side. Therefore, the more each side in an industry can be collected together so as to act with one mind, the better for the policy. Enthusiasm for joint action is the driving force, and disintegration of the union is the supreme danger. The men's union, more especially, must be able to protect itself against any form of attack calculated to arouse doubts and suspicions in the minds of members, and so to destroy the cohesion and will to act of the union. Against endeavours of this sort the union must have powers of defence ; and the most effective power of all is the right of action in the King's courts. Indeed, that right seems to me vital, and I cannot think that Parliament could possibly have intended not to confer it.

In truth the principle involved has been decided by the House of Lords in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1), for if the persona juridica is liable to be sued for infringing the rights of others, it must equally be able to sue to vindicate its own right. Birkett J. has dealt with this aspect quite fully, and I have nothing to add except the obvious comment that the veto on any proceedings, either by or against a trade union, conducted for the purpose of enforcing various agreements, coupled with the absence of any reference to actions of tort, is wholly consistent with the above conclusion and supports it. It follows that the first question must be answered in the affirmative: a trade union can, generally speaking, sue in tort.

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(1) [1901] A. C. 426.

(2.) It being assumed that a trade union can sue in tort, I can see no ground for excluding the action of defamation. The attack made in the present case, the merits of which are of course in no way before the court, is a sufficient illustration of the disintegration of a trade union which might be produced by unjustifiable libels uncontrolled by the fear of action in the King's courts. Such distintegration may easily result, and the object of the Acts—the trade-union system of collective bargaining—be utterly defeated. That is, to my mind, more than a sufficient reason against making libel an exception to the general rule that a trade union may sue in tort. I see no reason why in this respect a trade union should be treated differently in law from a company under the Companies Act: see *D. & L. Caterers, Ld.* v. *D'Ajou* (1).

(3.) For a proceeding under Or. 25, r. 2, the allegations of the statement of claim must be assumed to be true. If the answers given to questions one and two are well-founded, the answer to the last question obviously is that the case before us is typically one in which those answers apply.

The appeal must be dismissed with costs. If it is wanted, leave to appeal to the House of Lords is given.

MacKinnon L.J. I had begun to write a judgment arriving at the same conclusion, when, owing to their greater industry, I had the opportunity of reading what had already been written by my brethren. Having done so, I feel I can consign my fragment to the wastepaper basket and content myself by saying that I agree with them.

Uthwatt J. I agree. The point decided in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (2), was that a registered trade union might properly be named as a defendant to an action. That decision involves, to my mind, that a registered trade union is recognized by the law as a body distinct from the individuals who from time to time compose it. It is not a corporation; but it is very much like one. The association is not merely the aggregate of the persons who compose it, and the presence of the corporate fiction is not necessary to secure its individuality. In an age of neologism it might be called a "near-corporation."

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(1) [1945] K. B. 364.

(2) [1901] A. C. 426.

Subject to the question of the illegality of the plaintiff union, I think that on this footing it, as a body, has the ordinary rights of persons recognized by law as respects freedom from unlawful attacks, and is in a position in its own name to seek redress in the courts in respect of any such attack. In these proceedings the plaintiffs claim redress in respect of a libel which clearly relates to their conduct in carrying out the objects for which, as a trade union, they were properly formed and registered.

It is well established that in certain cases a trading corporation may bring a suit in respect of an imputation on its trading reputation, and I see no reason why a non-trading corporation should not have the same rights as respects imputations on the conduct by it of its activities. A trade union to my mind stands in the same position. It, too, has its reputation. Why should it not be protected? The social duty so to conduct the affairs of the union as not to invite well-founded criticism is hardly forwarded by a denial of the right to seek redress for an unjustified disparagement of its activities. The circumstance that the property and claims to property of a registered trade union are by the Act of 1871 required to be vested in trustees for the union and its members appears to me to be irrelevant. The claim in the action is not a claim to property. With this claim the trustees have no concern, whatever may be their position as regards any damages recovered and paid.

There remains the question of illegality. It was strenuously contended that the plaintiff union was, in the eyes of the law, an illegal association, and that, therefore, it could not sue in the courts as plaintiff in a libel action, or, indeed, in respect of any other matter. In support of the first part of this contention it was argued—and I am content to assume the argument to be right—that the plaintiffs' rules, while not at common law involving the parties to those rules in a criminal conspiracy, were, according to the conception of the common law, in unreasonable restraint of trade. The plaintiff union, it was contended, was an illegal association at common law. As regards the second part of the contention under discussion, it is, of course, a well-established principle that the law will not aid the enforcement of any transaction tainted with illegality. I do not, however, accept the proposition that an illegal association cannot for any purpose be a suitor in the courts: see the cases cited in Lindley on Partnership, 10th ed., p. 136.

It is, however, unnecessary to discuss this matter, for it appears to me that the position which this trade union would occupy at common law does not enter into the picture at all. In my view, a registered trade union, to whose purposes the only objection taken is that some of its rules are in unreasonable restraint of trade, is, as the result of the Trade Union Act, 1871, a lawful body. The point may be put quite shortly: Under the Act of 1871 a body is not a trade union (see the definition in s. 23) unless, by reason that some of its purposes are in restraint of trade it would " if this Act had not been passed " be deemed to have been an unlawful combination. Unlawfulness at common law was therefore a condition precedent to the right to register, and it was not till 1876 that a lawful combination might register. The practical consequences in law of the presence among the purposes of a trade union of provisions in restraint of trade are got rid of by ss. 2 and 3 of the Act of 1871. The sections relating to registered trade unions provide, in s. 6, that the registration of a trade union any of whose purposes is unlawful shall be void; in s. 8, that the trade union as such is a body for which property may lawfully be held; in s. 9, that its trustees may bring suit in respect of the property of the union; and in s. 14 that the rules of a trade union shall contain certain specific provisions. It is not necessary to refer to any other details or to the other Acts relating to trade unions. When it is found that an entity is duly created by registration under an Act; that its affairs are in many respects subject to statutory regulation; that the illegality at common law of the association present in such a creature was in the mind of Parliament when passing the Act; that the association is referred to in the Act as a combination " which if this Act had not been passed would " have been deemed to be an unlawful combination "; and that its registration would be void if any of its purposes is unlawful, surely it is an impossible inference that Parliament has succeeded in creating an unlawful combination or illegal association. If that were Parliament's intention, the method adopted was somewhat tortuous.

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In my opinion, therefore, a registered trade union is a lawful body entitled to sue in the courts, and the plaintiff union in this action for libel can properly rely on its objects as showing the proper scope of its activities notwithstanding that its objects are in restraint of trade. Upon that last point the principle of *Fivaz* v. *Nicholls* (1), has, in my view, no application. There is no turpis causa.

Appeal dismissed.

Solicitors for first two defendants: *A. L. Philips & Co.*
Solicitors for third defendants: *Robert Clayton & Co.*
Solicitors for plaintiffs: *Syrett & Sons.*

(1) (1846) 2 C. B. 501.

1945
Nov. 8.
Humphreys and Lynskey JJ.

PERRINS *v.* SMITH.

Food and drugs—Slaughter-house—Cow sheltered in shippon, by leave of farmer—Shippon not used for slaughter of animals and not licensed as a slaughter-house—Cow slaughtered in shippon by owner, a butcher—Part of flesh intended for sale for human consumption—Unlawfully using premises occupied by the farmer as a slaughter-house, he not holding a licence—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 57 *and* 100.

S., a butcher, who was allowed by a farmer to keep his cow in the farm shippon, on November 24, 1944, in the absence and without the permission of the farmer, slaughtered the cow in the shippon, part of the flesh of the cow being intended for sale for human consumption. The farmer did not hold a licence under s. 57 of the Food and Drugs Act, 1938, to keep the shippon as a slaughter-house. No part of the farm premises had ever been used in connexion with the business of slaughtering animals nor was such business in any way carried on by the farmer. An information against S. charging him with having used the premises as a slaughter house in contravention of s. 57 was dismissed by the justices:—

Held, that it was no offence against that enactment to slaughter an animal on premises which were not used in connexion with the business of slaughtering animals and the information was properly dismissed.

Case stated by Southport justices.

Richard Whalley Webster was a farmer and the occupier of Brook Farm, Blowick. Part of the farm buildings comprised a shippon. Webster permitted the respondent, Frank Smith, a butcher, to shelter his cow and keep some poultry in this shippon. On November 28, 1944, in the absence of Webster and without his permission, the respondent slaughtered the cow in the shippon. Part of the flesh of the cow, at the time of the slaughter, was intended for sale for human consumption. Webster did not hold a licence under s. 57 of the Food and Drugs Act, 1930 (1) authorizing him to keep the shippon as a slaughter-house. Webster was not a slaughterer of animals and the shippon was not used in connexion with the business of slaughtering animals. Previously, no animal had been slaughtered there. The respondent, Smith, was charged on an information preferred by the town clerk of Southport that he on November 28, 1944, unlawfully did use, contrary to s. 57 of the Food and Drugs Act, 1938, certain premises occupied by Webster at Brook Farm Blowick, as a slaughter-house, the said Webster not then holding a licence granted under s. 57 of the Act by the local authority authorizing him to keep those premises as a slaughter-house.

The justices were of opinion that (1.) the shippon did not constitute premises used in connexion with the business of slaughtering animals, and (2.) the slaughter there of a cow by the respondent on November 28, 1944, was not a use by the respondent of the premises at Brook Farm as a slaughter-house contrary to s. 57, and they dismissed the information. The town clerk appealed.

Baucher for the appellant. The slaughter of an animal on a single occasion, if the flesh of the animal is intended for human consumption, is a use of the premises on which the slaughter

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(1) Food and Drugs Act, 1938, s. 57: "(1.) It shall not be "lawful—(*a*) for the occupier of "any premises to use them as a "slaughter-house . . . . or permit "them to be so used, unless he "holds a licence granted under this "section by the local authority "authorizing him to keep those "premises as a slaughter-house ". . . .; or (*b*) for any person "other than the occupier to use "any premises as a slaughter-"house . . . . unless the occupier "of those premises holds in respect "thereof such a licence as afore-"said . . . . (8.) A person who "uses any premises as a slaughter-"house . . . . in contravention of "the provisions of this section or "permits any premises to be so "used, shall be guilty of an "offence."

Section 100: "In this Act, "unless the context otherwise "requires—'animal' does not in-"clude bird; 'premises' includes "messuages, buildings, land, ease-"ments and hereditaments of "any tenure; 'slaughter-house' "means any premises used in "connexion with the business of "slaughtering animals, the flesh "of which is intended for sale for "human consumption."

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takes place as a slaughter-house within the meaning of s. 57, sub-s. 1, of the Food and Drugs Act, 1938.

Milmo for the respondent. If the decision of the justices was one of law, it was correct: if of fact, there was evidence to support it. By s. 100 of the Act of 1938 a "knacker's yard" means any premises used in connexion with the business of slaughtering, flaying or cutting-up animals, the flesh of which is not intended for human consumption. The argument for the appellant, therefore, is that if a person kills an animal on any premises which are not licensed either as a slaughter-house or as a knacker's yard, he commits an offence under s. 57. On that contention a man who shoots a rabbit in his own field commits an offence against s. 57. Parliament could have made the slaughter of any animal not on premises licensed under s. 57 an offence (see the Livestock (Restriction on Slaughtering) (No. 2) Order, 1940), but did not do so by the terms of s. 57. The appellant's argument gives no meaning to the words in s. 100 of the definition of "slaughter-house," i.e., "premises used in "connexion with the business of slaughtering animals." The respondent did not use the shippon as a "slaughter house" contrary to s. 57, since a slaughter-house means premises used in connexion with the business of slaughtering animals.

HUMPHREYS J. The question in this case is: did the respondent use these premises as a slaughter-house? It was contended for the town clerk that, although it might be said that these premises did not come within the definition of "slaughter house" in s. 100 of the Food and Drugs Act, 1938, yet they were, on November 28, 1944, being used as a slaughter-house. That implies, I think, that the killing of any animal on those premises would be a use of the premises as a slaughter-house. Had Parliament intended to prohibit the killing of any animal in any place which was not a licensed slaughter-house or knacker's yard, it would have been easy to say so and our attention has been drawn to the provisions of the Livestock (Restriction on Slaughtering) (No. 2) Order, 1940, by which, except under the terms and conditions of a licence granted under the authority of the Minister of Food, no person shall slaughter or cause to be slaughtered for human consumption any livestock, which means any of the animals defined in the definition of "livestock." But that was not what was provided by s. 57 of the Food and Drugs Act, 1938. In my opinion such absurd consequences would follow from our holding that these premises, although it is clear that they do not come within the definition of "slaughter-house" in the Act, yet were used by the respondent on this occasion as a slaughter-house, that I am not prepared to differ from the conclusion at which the justices arrived. It has been said with truth by Mr. Milmo that were we to hold otherwise, any person who killed an animal, other than a bird—if, for example, he shot a rabbit—in his own field he would be guilty of using that field, which comes within the definition of "premises" in s. 100 of the Act, as a slaughter-house. Since no one could ever hope to obtain a licence for the whole of his property, over which he had the right of shooting, as a slaughter house, any one who shot any animal, other than a bird, which was intended for sale for human consumption, would be guilty of an offence under s. 57. For these reasons I think that the justices came to a right conclusion and this appeal must be dismissed.

LYNSKEY J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for R. Edgar Perrins, town clerk, Southport.*

Solicitors for respondent: *Pritchard, Englefield & Co., for Brighouse, Jones & Co., Southport.*

C. G. M.

PRATT *v.* NORTH-WEST NORFOLK ASSESSMENT COMMITTEE.

1945
Nov. 12, 13.

Lord Greene M.R., MacKinnon and Tucker L.JJ.

Rates—Valuation list—Indefinite postponement of new valuation list—Proposal to amend gross and rateable value of a property—Proposal approved—One of many proposals in rating area—Supposed general rise in values—Valuations over whole area intended with view to proposals for amendment—Validity—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *ss.* 19, 37—*Rating and Valuation (Postponement of Valuations) Act,* 1938 (1 & 2 *Geo.* 6, *c.* 19), *s.* 1—*Rating and Valuation (Postponement of Valuations) Act,* 1940 (3 & 4 *Geo.* 6, *c.* 40), *s.* 11, *sub-s.* 3.

By the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940, the making of quinquennial valuation lists provided for by s. 19 of the Rating and Valuation Act, 1925, was indefinitely postponed. The result was that in the Docking rural rating area no new list had been made since 1934. In 1942, the County Valuation Committee made a proposal under s. 37 of the Act of 1925 to amend the current valuation list as regards a house in one of the twenty-nine parishes constituting the Docking rural rating area, by raising the gross and rateable value. This was approved by the Assessment committee but the owner of the house appealed to the Court of Quarter Sessions who stated a case for the decision of the Divisional Court. A number of other proposals as to property in four of the parishes had been made and nearly all approved. The County Valuation Committee was carrying out a systematic inspection and valuation of every property in the rating area with a view to making further proposals so as to raise the general level of assessments in the rating area. The owner of the house contended that the proposal in respect of it was invalid and illegal as being one of a series of proposals which would together amount to a proposal for a new valuation list, contrary to the provisions of the Acts of 1938 and 1940:—

Held (reversing the Divisional Court), that there was nothing to prevent a proposal under s. 37 of the Act of 1925 in respect of every property in the rating area and that even if one hundred per cent. of the proposals were approved, the result would not be a new valuation list but the current valuation list amended, so that nothing illegal would have been done.

APPEAL from the Divisional Court.

On August 17, 1942, the County Valuation Committee for the County of Norfolk made a proposal under s. 37 of the Rating and Valuation Act, 1925, to amend the current valuation list for the parish of Heacham in the Docking Rural Rating area, Norfolk, by raising the gross value of Westview, Cheney Hill, Heacham, from 14*l.* to 20*l.* and the rateable value from 8*l.* to 12*l.* On December 8, 1942, the owner W. J. Pratt (hereafter called the respondent) objected in writing to the proposal. On December 18, 1942, the North-West Norfolk Assessment Committee (hereafter called the assessment committee) heard the proposal and objection and decided to raise the gross and rateable values as proposed. On January 5, 1943, the respondent appealed to the Court of Quarter Sessions. By consent of the respondent and of the assessment and valuation committees a special case was stated for the decision of the Divisional Court, the parties agreeing that judgment in conformity with the decision should be entered by Quarter Sessions.

The facts, as further set out in the special case, were as follows: The parishes of Heacham, Snottisham, Dorsingham and Ingoldisthorpe were four out of the twenty-nine parishes for which the Docking Rural District Council (hereafter called the rating authority) were the rating authority. By s. 19 of the Act of 1925, it is provided that a valuation list should be made for every rating area so as to come into force on April 1, 1928 or 1929 and a second valuation list to come into force on April 1, 1932, 1933 or 1934, and that thenceforth new valuation lists should be made to come into force at five year intervals. By s. 1 of the Rating and Valuation (Postponement of Valuations) Act, 1938, the third new valuation list was to come into force on April 1, 1941, but by s. 1, sub-s. 3, of the Rating and Valuation (Postponement of Valuations) Act, 1940, the making of the third valuation list was indefinitely postponed. The valuation list for the Docking Rural Rating area was therefore that which came into force on April 1, 1934. By s. 37, sub-s. 1, of the Act of 1925, " any person (including the " County Valuation Committee and any local authority), " who is aggrieved by the incorrectness or unfairness of any " matter in the valuation list for the time being in force . . . . " may make in manner provided by this section a proposal for " the amendment of the list . . . ."

The total number of hereditaments in the area of the rating authority was 6,410, of which there were in the four specified parishes 2,377. In December, 1940, the County Valuation Committee being of opinion that the general list of the existing assessments in the rating area was too low, made proposals to increase the assessments of twenty-two houses in Ingoldisthorpe seventeen in Heacham and five in Dorsingham. These proposals were approved. Between December, 1941, and December, 1942, the County Valuation Committee made proposals relating to five hundred and seventy-seven hereditaments (including that which was the subject of the appeal) in the four parishes. All of these proposals (except eight, of which two stood adjourned) had been approved. The acting county valuation officer on behalf of the valuation committee had before December, 1942, inspected six hundred and eighteen further hereditaments in three of the four parishes. No proposals had been made in respect of them pending the result of this appeal, apart from eight further proposals which had been approved.

On July 20, 1942, a minute was entered by the rating authority in their minutes book in which it was stated that there was considerable concern in Heacham parish regarding what appeared to be the omission or delay by the acting county valuation officer in submitting proposals regarding the larger properties. In reply the officer wrote as follows to the rating authority: "There are a small number of larger properties "which have not yet been dealt with by me as I have not had "time to do so, but I have endeavoured throughout to value "all properties without regard to size. Any properties which "have been omitted will be revalued in the near future and "proposals made if necessary." In December, 1942, the officer on behalf of the valuation committee was actively continuing a systematic inspection and revaluation of all the hereditaments in the rating area with a view to the making of further proposals so as to raise the general level of the existing assessments in the rating area.

The respondent contended that the county valuation committee, through proceeding by separate proposals, were in effect carrying out a revaluation of the whole of the rating area; and that the proposal which was the subject of this appeal was invalid and illegal as being one of a series of proposals which would together amount to a proposal for a new valuation list contrary to the provisions of the Act of 1925 and the Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940.

Birkett J., who read the judgment of the Divisional Court (Lewis, Oliver and Birkett JJ.), said that in addition to the question raised by the special case, whether the proposal by the county valuation committee in regard to the respondent's property was good and valid, a question had been raised as to the jurisdiction of Quarter Sessions to hear the appeal. He proceeded to examine authorities referred to on the question of jurisdiction and said that the complaint to Quarter Sessions in this case was not, as in *Hulme* v. *Bucklow Area Assessment Committee* (1), that the form of procedure enjoined by the Act of 1925 had been improperly or irregularly followed in what was done, but that what had been done was not permitted by law and was therefore invalid. It followed that the court had jurisdiction to hear the appeal. On the question raised in the special case, it was clear that if the county valuation committee were using its undoubted powers under s. 37 of the Rating and Valuation Act, 1925, to obtain necessary corrections and amendments of the existing valuation list, the mere fact that they made a great many proposals would not affect the position. By doing that, the committee would not be making a new

(1) [1940] 2 K. B. 255.

valuation list. Here it was contended that under the guise of actions within s. 37 the county valuation committee was doing what s. 19 empowered only the rating authority to do. On the facts it was difficult to resist the conclusion that the county valuation committee was doing what it was by reason of the postponement by law of the making of a new valuation list and because a situation had arisen which made the absence of a new and revised valuation list a most regrettable thing. It was really impossible to say that all that the county valuation committee had been in course of doing since 1940 was done in pursuance of the ordinary fulfilment of its statutory duty. The true view was that because the new valuation list due in 1939 could not be brought into being, the county valuation committee was using methods designed to bring about the same result. For these reasons the appeal must be allowed and the proposal in question declared not to be a valid or legal proposal. The county valuation committee and the assessment committee appealed.

On the appeal no question was raised as to the jurisdiction of the Court of Quarter Sessions.

Comyns Carr K.C. and *Harold B. Williams* for the appellants. The Rating and Valuation Act, 1925, made provisions as to rating in the country and by s. 19 provided for quinquennial valuation lists after the first and second valuation lists. This merely imposes new duties but not any limitation on the cause or nature of any valuation made between the making of these lists, and s. 37 gives the county valuation committee power to propose an amendment as regards any particular property on the ground that in regard to this item the existing valuation list is no longer accurate. Similarly there was no negative provision in the Rating and Valuation (Postponement of Rating) Acts, 1938 and 1940 which have postponed the making of a new valuation list indefinitely. It is said that the proposal in question here is invalid because it is part of a scheme to make proposals over the whole rating area. It is said that this amounts to making a new valuation list in breach of the statutes; but at the most all that would be achieved is far-reaching amendments of the existing valuation list. Section 18 of the 1925 Act constituted the county valuation committees and imposed the duty to insure equality of rating, and s. 37 provides the means of obtaining alteration in the rating for this purpose. The Act of 1940 postponed the making

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of new valuation lists not only in the country but also in London and as the powers of revision applicable in London under the Valuation (Metropolis) Act, 1869, were narrow, provisions were inserted in the 1940 Act to extend them. Nothing of the kind was necessary in regard to the 1925 Act. Section 37 imposes no limit on the grounds on which a proposal may be made. It is said that an attempt is being made to make a new valuation list by proposals, but it is to be noted that the proposals here are being made by the county valuation committee, a body not concerned with making a new valuation list under s. 19. There is no evidence on the facts that an attempt is being made to make a new valuation list, and even if every item in the old list was altered, it would remain the old valuation list as amended. [They were stopped.]

Beney K.C. and *Gilbert Dare* for the appellant. It was not suggested in the court below that the facts did not show that a new valuation list was in effect being made by proposals, but it was said that there was power to make under s. 37 so many amendments that the old list would become in substance a new list. The special case shows that it was suspected that there had been a general rise in values over the whole rating area and that the valuation committee was taking steps to obtain increases over the whole area by proposals. There is a statutory prohibition against disturbing the existing valuation list by making a new one and the attempt to achieve this by proposals is therefore illegal. It cannot be said that s. 19 of the Act of 1925 was dealing merely with matters of form in providing for quinquennial valuation lists, so that unless a list is made that can be described as a new valuation list, a complete amendment of the existing list is unobjectionable. Section 37 has a much more limited meaning than has been suggested. It is not intended to enable the same result as the making of a new valuation list under s. 19 to be achieved. Where there is a proved attempt not merely to revise entries in the current valuation list because the entries are incorrect or unfair, but to revise all the entries owing to a general rise in values in the area, that is an illegitimate use of s. 37.

[Lord Greene M.R. What the special case says is consistent with the values in the current valuation list having always been too low.] In any case s. 19 clearly forbids an intervening new valuation list. [They referred to *R.* v. *Horsham and Worthing Assessment Committee* (1) and *Murphy Radio, Ld.* v. *Welwyn Garden City Rating Authority* (2).]

(1) [1937] 2 K. B. 408.

(2) [1943] 2 All E. R. 16.

Comyns Carr K.C. replied.

LORD GREENE M.R. It is important at the outset to have a clear view of the relevant facts because it is on an appreciation of those facts, when related to the statutory provisions, that the decision in this case depends. I do not propose to go through all the matters mentioned in the special case, but there are one or two circumstances that are important. [His Lordship stated the facts as to the proposals made and the valuations carried out and continued :] The position then is obviously as follows. The existing valuation list, which came into force on April 1, 1934, has been amended in certain particulars. All the proposals so far made, with the exception of eight, six of which were rejected, have been accepted, and the valuation list in respect of those accepted proposals, therefore, stands amended. In so far as it has not been amended, it remains the valuation list in force since 1934. We may assume that the twenty-nine parishes comprise a large number of hereditaments which at present have not been made the subject of any proposals. There are also a number of hereditaments in the parishes in respect of which proposals have already been made, that have not been inspected or valued, and have not been made the subject-matter of proposals down to the present-day. Whether or not the county valuation committee, when it has completed its valuation, will think fit to make any, and, if so, how many, proposals with regard to the remaining hereditaments in the rating area is quite uncertain. For all we can tell, they may come to the conclusion that they will not make any further proposals in the rating area at all, or they may decide that some or all of the hereditaments are hereditaments in respect of which they ought to make proposals. But not only do we not know whether any proposals will be made, but it is impossible for us to tell, on the assumption that further proposals will be made, what the fate of those proposals will be. They may be accepted or they may be rejected. If they are accepted, the valuation list will be amended. If they are rejected, the valuation list will not be amended.

Those are the facts on which the Divisional Court has held that the assessment now in question is illegal. The ground on which it is said to be illegal, broadly stated, is that the operation on which the county valuation committee has been engaged in respect of this particular rating area is in substance

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the making of a new valuation list, and that the making of a new valuation list is prohibited during the period of suspense laid down by the Rating and Valuation (Postponement of Valuations) Acts, 1938, and the Rating and Valuation (Postponement of Valuations) Act, 1940. It is said that the county valuation committee is engaged on an operation, namely, the making of a new valuation list, which is prohibited by statute, and, therefore, that any changes in assessments made in pursuance of that operation must be illegal. It appears to me, with all respect, that, once the facts are appreciated, that conclusion cannot stand. Let me assume that the operation on which the county valuation committee is engaged is completed. It is impossible to see what the result will be when that happens. As I have already pointed out, for all we know the valuation list may be left standing, with the exception of what has already been done, or it may be altered in further particulars. But to call the result a new valuation list appears to me to be a misconception both of what a valuation list means, and of the effect of amendments resulting from proposals under s. 37 of the Rating and Valuation Act, 1925. When the operations are completed, there will be in existence a document that quite clearly will be the 1934 valuation list amended in such particulars as in the result may be made the subject of amendment. In so far as there are no alterations in the 1934 list, obviously the assessments appearing in that document will continue to owe their legal validity and force to the fact that they appear in that valuation list and to nothing else. They will derive no force from the circumstance that the county valuation committee has valued those hereditaments, and has either decided not to put forward proposals in respect of them, or put forward proposals which have been rejected. If that happens, it simply means that those items in the valuation list are left undisturbed. The fact that an attempt is made to amend them will not alter the position at all. The position of such a document, the ultimate form of which is quite uncertain on the facts, is, as I have said, that it is the 1934 valuation list amended by means of such proposals as may be accepted under s. 37.

An argument which is sometimes difficult to combat is to assert that a thing is in substance that what it is not, but in this case I cannot see what force that argument has got. It is simply not true to say that the list as amended pursuant to accepted proposals is a new valuation list. And to put in the words

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"in substance" does not make it any more true. You have to look and see what the document is upon which legal rights depend, and in so far as items in the 1934 valuation list have not been altered by proposals, they flow from the valuation list itself as originally made. In so far as a proposal has been made and has been adopted and the consequential amendment has been made in the valuation list, that entry owes its force to the amendment made under the powers of s. 37. To say that such a document is in substance a new valuation list is an argument I am unable to follow, much less to accept. On the facts, therefore, in this case, it appears to me impossible to establish the proposition that the present assessment is invalid on the ground that it is part of an operation amounting in substance to the making of a new valuation list.

But, in support of the argument, certain considerations were urged to which I must refer. It was said by Mr. Beney that the circumstance was immaterial, that the particular authority which was engaged in this operation was the county valuation committee and not the body entrusted, under s. 19, with the duty of making a valuation list. Mr. Beney said that the appellants' argument to the contrary really carried no weight, for the reason that under s. 37 proposals could be made by the very authority which, in normal times, prepared the draft valuation list, namely, the rating authority. I do not pause to inquire whether that argument of Mr. Beney's is right or wrong. I will assume that it is right and examine the arguments on the assumption that the operation now being conducted by the valuation committee was in fact being conducted by the rating authority itself. In my opinion it could no more be said in that case that the rating authority was engaged in making a new valuation list than it could be said that the county valuation committee was doing so now. Incidentally, the making of a new valuation list in any intelligible sense does not describe the function which, under ss. 19 and 25 falls on the rating authority. The rating authority prepares the draft list. That is published and acts as an advertisement to those concerned. The actual document which produces the legal effect and becomes the valuation list, is a document which comes into existence through the action of the assessment committee. Until the assessment committee has performed its function with regard to the draft list and dealt with objections, and so forth, there is no valuation list in existence.

The argument that Mr. Beney presented to us may be conveniently dealt with, I think, under three heads. The first head, as I understood it, was that the real vice of what was done lay in the circumstance that a general valuation was being made of the whole of the rating area. That, it was said, meant that a new valuation list was in substance being prepared. That seems to me to be an impossible view. What the county valuation committee was doing in conducting valuations was to inform itself whether there was or was not a case for making proposals in respect of the hereditaments valued. The valuations would be useful to enable them to support the proposals they decided to make, but they were carried out with the sole object of seeing whether any and what proposals should be made. To say that the valuation of the hereditaments in the rating area was in substance the making of a new valuation list is not an intelligible proposition. It was nothing of the kind. Mr. Beney, in that branch of his argument, repudiated the suggestion that the number of proposals which might be made or accepted as the result of the valuation was a material matter, because it was the valuations irrespective of the consequences that might ensue which constituted the vice and turned the whole operation into the making in substance of a new valuation list. But he also argued that you must look and see what has happened and if what has happened amounts to a sufficiently large revision of the valuation list then in substance it must be regarded as the making of a new valuation list. It was, he said, a question of degree. What precise percentage of alterations would be necessary to produce that result was left in obscurity. Surely it would be intolerable that the validity of assessments should depend on what a court subsequently considered to be the precise point at which the making of proposals and amendments of the valuation list ceased to be a legitimate operation under s. 37 and became an illegitimate operation on the ground that it was in substance the making of a new valuation list. That would leave the whole list in a state of chaos and uncertainty. Moreover, quite apart from this consideration it is not true to say that an existing valuation list which has been altered five, ten, seventy-five, eighty, ninety, or even ninety-nine per cent., and left standing with regard to the balance, is a new valuation list. It is not; it is an amended valuation list and the extent of the area which the amendments cover appears to me to be immaterial. There is nothing in s. 37 to suggest that the area of permitted proposals and consequential amendment is to be restricted by any such consideration. In fact, it is, I think, true to say that the decision of the Divisional Court and the argument which was presented to us on behalf of the respondent require an entire re-writing of s. 37.

There was the further point taken that however that might be in regard to sporadic action relative to individual hereditaments, however true it might be to say that a very large number of amendments of that character were legitimate, when once the proposal in question is made pursuant to a general valuation based on a general rise in values over the area, it becomes automatically wrong. It was said that although you could have amendments up to ninety per cent. of the hereditaments based on the particular circumstances of each hereditament, you could not have amendments of ninety per cent. of the hereditaments where the alteration was based on a general rise in values. There is not a word of that to be found in s. 37. It is quite illegitimate to my mind to write into s. 37 a new proviso that proposals of more than a certain percentage based on a general rise in values could not be made.

The argument really depends on some observations made in the course of two cases in the Divisional Court. The first is *Rex* v. *Horsham and Worthing Assessment Committee* (1), where a very large number of proposals with regard to shops, houses and flats in the particular borough were made. The rating and valuation committee of the Worthing Council resolved that a re-valuation of premises be carried out with a view to proposals being made for the amendment of the valuation list. A very large number of proposals ensued. There were well over 20,000, all made on the basis that the existing valuations were too low. The Divisional Court upheld the legality of the proceeding and in the course of their judgment they appear to suggest a distinction between cases where amendments are proposed as the result of some general consideration and cases where amendments are proposed by reason of the particular circumstances of specific individual hereditaments. This will be clear from reading one or two passages from the judgment of Lord Hewart C.J. He said (2) this: "It is manifest, therefore, at the outset that what was being "considered by the borough of Worthing was not a suggestion "for the making of a new valuation list because of some general "consideration, such as a general rise in the annual value of the

(1) [1937] 2. K. B. 408.

(2) Ibid. 415.

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" properties. It was a suggestion for a detailed revision of the " current list because of specific incorrectness in the case of a " series of individual hereditaments." Later he said (1): " Nobody here suggests that the causa causans of the action " complained of was, or was believed to be, a fluctuation of " general value occurring after the bringing into force of the " valuation list." Singleton J. said (2): " The argument that " what took place was the making of a new valuation within the " quinquennial period fails on the facts. No new list was made, " but a very large number of amendments was made to the " current list. If something was done which was in fact the " making of a new list, it might well be said to be contrary to " the spirit of the Act, and in particular to s. 19, but that did " not take place. There is no need to consider such a case " unless and until it arises, and it may then turn out really to be " a question of fact." In that case, having regard to the view which was taken of the facts, the proposals in question although very large in number were regarded as being of specific and individual natures. That was considered by the Divisional Court to be a sufficient ground for deciding the case without going into the larger question. But in so far as the suggested distinction referred to in the passages which I have read was made in those judgments, I should, with respect, disagree with it. I can see no justification whatever, once it is admitted that a large number of specific proposals can be made, for saying that a similar number of proposals cannot be made because they are based on some general proposition. That idea is one which I cannot for a moment accept. It involves re-writing s. 37, and what justification is there for that? The argument that the result is to do in an indirect way what could only be done in a direct way, namely, the making in substance of a new valuation list, I have already dealt with. It may very well be, having regard to the circumstances in which the Postponement Acts were passed, that it never occurred to the legislature under the first Act that it would be thought worth while, and under the second Act that it would be found practicable or desirable in war circumstances, to conduct a large-scale operation such as this. The Legislature may very well not have directed its attention to the possibility, that under s. 37 a very large alteration of an existing valuation list might be effected. Of course, in the event, the valuation lists have remained in force for ten years and more and the difference in value in

(1) [1937] 2 K. B. 417. (2) Ibid. 424.

many cases has doubtless been very considerable; but there is nothing in s. 37 which prevents the making of proposals based on a general rise in values. The most impossible complications would be involved if we accepted any such view. Supposing, for instance, there was in an area a very large proportion of hereditaments of a particular type, such as factories or shops, the authorities might take the view that circumstances had so changed that the assessments ought to be increased. Is it to be said that the whole proceeding of conducting a general inspection with a view to a general alteration of assessments with regard to a particular class of hereditament in the rating area is abortive and void?

There is one more authority which I should mention. It is *Murphy Radio, Ld.* v. *Welwyn Garden City Rating Authority and Another* (1). In that case Stable J., who was a member of the Divisional Court, said (2): "As regards the second point, "if the appellants had been able to say that what was done here "was to alter the valuation because of what has been described "as some general economical or social change, the result might "—I do not say that it would—have been different. Whether "what was done here comes within that category or not, in my "judgment, is essentially a question of fact. There are no "facts found in this case to support the contention that what "really happened was that a fresh valuation was being made "piecemeal and that what was done was a colourable attempt "to make a fresh valuation and not to deal with errors or "omissions that were apparent on the face of the valuation "when it was made." That passage, in so far as it suggests the distinction to which I have referred, in my opinion cannot be supported.

The argument for the appellants led to the larger conclusion that even if proposals were made for every single hereditament in the rating area and were accepted, with the result that every item in the valuation list was altered, nevertheless that would be a perfectly valid operation to be effected under s. 37. What I have said so far has been on the basis that there is no evidence on the facts of this case that such a result will ensue. In fact, it cannot ensue in view of what has happened in the past and we are not justified in assuming that it will ensue in the future. But the broader argument is one which really lies at the bottom of the whole consideration of this case. It is said that even if a list were amended to the extent of a hundred per

(1) [1943] 2 All E. R. 16.

(2) Ibid. 19.

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cent., the proper description of the resulting document would not be a new valuation list but the original valuation list as amended. I can see no answer to that argument. The valuation list is a thing which comes into existence in the manner laid down by the statute and has the legal consequences that the statute provides. If subsequently it is decided to amend that list by altering the assessments the document is still the original list as amended. It is not a new valuation list for the very simple reason that a new valuation list can only be made in a certain way. It is, in my judgment, true to say even in that case, that the resulting document is the old valuation list as amended pursuant to s. 37 of the statute. If that were not the case some very remarkable results would follow. The county valuation authority, whose duty it is to promote uniformity in the principles and practice of valuation, may set about trying to get the assessments put up piecemeal. That is what they have done in this case. At what point in the history of such a process is the law going to say "Stop! You are now reaching "the point where you are doing something illegal." I have already said why I cannot see how illegality comes into it however large the percentage of proposals may be. But apparently on the respondent's argument there is to be some mystical effect on bringing the percentage of alterations up to a hundred. The idea that directly that point is reached there is an illegality which affects the last amendment or the totality of the amendments which have been previously made seems to me to be an impossible result. I cannot see how any such theory could possibly be worked out in practice and I can find no foundation for it in the language of the statute. Quite apart from the case when a series of proposals spread over a number of years ultimately covers the whole area, I may mention another example which my brother MacKinnon mentioned in the course of the argument. A proposal can be made by any individual ratepayer. Supposing all the ratepayers in the area formed a Ratepayers' Association and decided that they were all over-assessed and proceeded through the association to value the whole of the area and each ratepayer as the result of that valuation decided to make a proposal to have his assessment put down. On what possible ground could it be said that he could not do it? Could it be said that all the ratepayers were precluded from availing themselves of the right to make a proposal which s. 37 gives them? The whole theory is unworkable as it arises from the idea that by the insertion of the words "in substance" a thing can be turned into something which it is not. When once that line of approach is abandoned and an attempt is made to construe the statute and discover what it means and what are the realities of the subject-matter with which the section deals, the matter becomes perfectly clear, reasonable and workable.

In my opinion the assessment was perfectly valid. The appeal succeeds, and the question raised by the case should be answered accordingly.

MacKinnon L.J. I agree, and I have very little to add. The appellant below, Mr. Pratt, was the owner of a house called "West View," Heacham. That hereditament was entered in the 1934 list as at a value of 14*l.* gross and 8*l.* net. On August 17, 1942, the county valuation committee made a proposal under s. 37 of the Act of 1925 to increase those figures to 20*l.* gross and 12*l.* net. On December 18, the assessment committee allowed the proposal and the 1934 list was amended in that respect. Mr. Pratt appealed against this amendment on the ground that the action of the county valuation committee in making the proposal as to his hereditament was illegal. On the clear terms of s. 37, manifestly there was no illegality whatever. The Divisional Court, however, has held that it was illegal. For the reasons that have been so fully expressed by the Master of the Rolls, I am quite unable to understand how that result can be arrived at. As I have said, it is beyond argument that the proposal of the county valuation committee and its acceptance by the assessment committee and the consequent amendment of the 1934 list are all patently within the powers conferred upon those bodies by s. 37. The special case sets out a mass of evidence as to the general activities of the county valuation committee, and the proposals they had already made as to hereditaments other than that of Mr. Pratt, and the likelihood of their making proposals as to yet other hereditaments. All that evidence on the appeal of Mr. Pratt as to the allowance under s. 37 of a proposal affecting his hereditament appears to me to be irrelevant and inadmissible. I agree that the appeal succeeds.

Tucker L.J. This case differs on its facts from several similar cases which have been before the courts, because here we have a finding in the agreed statement of facts that the county valuation committee were "continuing a systematic

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"inspection and revaluation of all the hereditaments in the "rating area with a view to the making of further proposals "so as to raise the general level of the existing assessments in "the said rating area." In other cases which have been before the courts, the issue has not been so clearly raised, because in those cases it was impossible to show what the activities or intentions of the authority concerned were with regard to the whole of the hereditaments in their area. This is a one hundred per cent. case, because the county valuation committee were admittedly engaged in the operation of revaluing every hereditament in the area, with the result that there might be some alteration in the assessment of every hereditament in the area. For that reason, amongst others, I do not think that much assistance is to be obtained from the decisions which have been arrived at in cases where the facts were quite different. For the reasons stated by my Lord, I agree that it is impossible in this case to say that the county valuation committee were engaged in the preparation of a new valuation list. It is clear they were not. When a valuation list is made the procedure is different, and the persons who prepare the valuation list are different. Furthermore, where a new valuation list is being prepared, it has to go in its entirety before the assessment committee for approval, whereas, in an operation of this kind, it may well be that proposals will not be made with regard to a number of hereditaments so as to bring their assessments before the assessment committee. For those and other reasons, it is quite clear that a new valuation list was not in fact being prepared.

But the argument by Mr. Beney, as I understand it, was really that while the county valuation committee may not have been engaged, strictly speaking, in preparing a new valuation list, it is, none the less, doing something so contrary to the whole intention of the Act of Parliament as to be illegal. In other cases where an effort has been made to uphold that view, proceednigs have been taken by way of obtaining rules for prohibition or certiorari for the purpose of challenging an operation of this kind in circumstances very different from those in the present case. As I understand the argument, it has always been that the intention of the Act was to specify periods when valuation lists would be made, and that if a rating authority, or a county valuation committee, engaged in a wholesale operation of this kind it was so contrary to the intention of the Act that it was unlawful and should be prohibited by proper process. I think the answer to that is that it is impossible to find anything in the Act which renders such an operation illegal. It is manifestly an operation which is being carried out within the four corners of s. 37, and, although I am inclined to agree, speaking for myself, that an operation of this kind was never envisaged when s. 37 was enacted, none the less the operation is clearly lawful within s. 37, and it is impossible to say that by engaging in an operation of this kind, which may result in a one hundred per cent. alteration of the assessments, the county valuation committee are doing anything unlawful.

Appeal allowed.

Solicitors: *Vizard, Oldham, Crowder & Cash for Mills & Reeve, Norwich; Metcalfe, Copeman & Pettefar.*

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Husband and wife—Separation deed—Construction—Covenant by husband to pay to wife clear annuity, payable weekly—No rule of law that covenant to bind covenantor's estate—" Contrary intention "—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 80, *sub-s.* 1.

There is no rule of law that a covenant in a separation deed by a husband to pay his wife an annuity is intended to bind the estate of the covenantor. Whether it does so or not, depends on the construction of the provisions of the deed.

Observations of Lord Atkin in *Kirk* v. *Eustace* [1937] A. C., at p. 496, considered.

APPEAL from Birmingham county court.

By a deed of separation executed on June 10, 1926, by Cecil Joseph Langstone and his wife, it was provided by cl. 1 (i.) that the wife might at all future times live apart from the husband and free from his control. By cl. 1 (iii.) " The husband " will pay to the wife . . . . for her separate use and for the " maintenance and support of herself a clear annuity of 104*l*. " . . . . payable by weekly payments of 2*l*. cash . . . . until " determined as provided by cl. 3 (ii.)," which was that: " if, at any future time, the spouses shall with their mutual " consent again cohabit as man and wife, or the wife shall not " remain chaste, the annuity . . . . shall thereupon deter" mine and the deed shall then become void." Clause 1 (iv.) was a covenant by the husband not to molest. By cl. 2 (i.) the wife covenanted to support and maintain herself in a manner suitable to their position in life, and by cl. 2 (ii.) not to molest her husband "at any future time." By cl. 2 (iii.) she covenanted to keep her husband indemnified against all debts and liabilities hereinafter contracted and incurred by her By cl. 3 (i.) it was provided that if the wife broke her promises contained in cl. 2 (i.) or (iii). the husband might deduct the amount of the liability so imposed by her on him in breach of the deed and might repay himself out of subsequent payments of the annuity. By cl. 2 (iv.) the wife covenanted not to take legal proceedings against the husband for any misconduct committed before the date of the deed. There was no provision such as that found in the deed of separation considered in *Kirk* v. *Eustace* (1) that the husband's obligation to pay was to endure "during the life of the wife."

Mr. Langstone died on April 2, 1944, and his widow sued his executor for arrears of the annuity under the deed as to 14*l.* accrued due before the date of the death of the husband and 92*l.* alleged to have accrued thereafter. The executor paid 14*l.* into court with an admission of liability and defended the action as to his liability for the payment of the annuity after the death of the husband. In a remitted action, the county court judge gave judgment for the executor. The widow appealed.

Baskerville for the widow. The proper construction of this deed was that the annuity was to last for the life of the widow —the annuitant. The phrase "at all future times" is used in cl. 1 (i.) of the deed. [Tucker L.J. But it is not used in cl. 1 (iii.) of the deed which grants the annuity.] Two events were specified in cl. 3 (ii.) of the deed, on the occurrence of which the annuity was to cease: (1.) resumption of cohabitation or (2.) if the wife should not remain chaste, and the cessation was limited to those two events. Expressum facit cessare tacitum. The case is concluded by the judgments in *Kirk* v. *Eustace* (1). This is not a personal covenant, limited to the joint lives of the husband and wife. See s. 80, sub-s. 1, of the Law of Property Act, 1925 (2). Lord Atkin in *Kirk* v. *Eustace* (1) after referring to this sub-section

(1) [1937] A. C. 491, 496, 497.

(2) By s. 80, sub-s. 1 of the Law of "Property Act, 1925 :—" A covenant . . . .under seal made after "December 31, 1881, binds the "real estate as well as the personal "estate of the person making the "same, if and so far as a contrary "intention is not expressed in the "covenant. . . . ."

said: "Therefore, this contract, which is under seal, is to "be read as if it were made by the husband for his executors "and administrators, unless a contrary intention is found "expressed in the covenant" and again (1): "the statute "quite plainly imposes an obligation which binds his estate "unless a contrary intention is expressed." See also the observation of Lord Russell of Killowen, in that case. As Fry J. said in *Blight* v. *Hartnoll* (2): "As a general rule there can be no "doubt that the gift of an annuity to A. is a gift of the annuity "during the life of A. and nothing more." [MacKinnon L.J. referred to *Charlesworth* v. *Holt* (3).]

G. L. Dawson for the executor. The decision in *Kirk* v. *Eustace* (1) is not in point since in the deed in that case the husband covenanted with his wife to pay her the weekly sum of *2l.* "during her life." In the deed in the present case there is no such provision. On the contrary, all the provisions in the deed now to be construed assume that the husband is still alive and apply therefore only during the period of the joint lives of husband and wife. Section 80, sub-s. 1 of the Law of Property Act, 1925, does not create a liability on the personal estate of the covenantor, it merely extends a pre-existing liability of that personal estate to his real estate. The issue here is whether there was a liability on the personal estate of the husband and that depends on the construction of the deed. On the construction of a deed of separation, see the judgment of Vaughan Williams L.J., in *Rowell* v. *Rowell* (4); [*In re Gilling, Procter* v. *Watkins* (5); *Negus* v. *Forster* (6) and *In re Lidington. Lidington* v. *Thomas and Others* (7) were referred to.]

Cur. adv. vult.

Nov. 14. MACKINNON L.J. read the judgment of Scott L.J. which was the judgment of the court. The sole issue tried by the learned judge was whether on its true construction the covenant by the husband bound his personal representative, or was limited to the joint lives of the spouses. Counsel for the widow both below and before us relied on the decision of the House of Lords in *Kirk* v. *Eustace* (8), or alternatively, if that

(1) [1937] A. C. 491, 496, 497.
(2) (1881) 19 Ch. D. 296.
(3) (1873) L. R. 9 Ex. 38.
(4) [1900] 1 Q. B. 9, 15.
(5) (1905) 74 L. J. (Ch.) 335.
(6) (1882) 46 L. T. 675.
(7) [1940] 3 All E. R. 600.
(8) [1937] A. C. 491.

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decision did not conclude the appeal in his favour, he submitted that his contention gave the proper meaning to the covenant and he further relied on certain observations of Lord Atkin, and possibly of Lord Russell of Killowen in that case. In our view neither argument avails the widow. Unless the deed or written contract under consideration is a matter of common form, at least in respect of the particular provision which falls to be considered, it is dangerous to seek to apply to it the judicial interpretation of another document unless that other document is so similar in its terms as to be almost identical; a principle applied to a separation deed by Bowen L.J. in *Nicol* v. *Nicol* (1). In *Kirk* v. *Eustace* (2) the deed of separation stated repeatedly and expressly that the husband's obligation to pay was to endure "during the life of the wife." The majority of the Court of Appeal in that case (Slesser and Scott L.JJ., Eve J. differing) thought that even that clear expression of intention ought to give way to other indications in the deed of an intention that it was only to operate during the joint lives of the spouses. The instant deed, as the learned county court judge has pointed out, differs in an important respect from the deed in *Kirk* v. *Eustace* (2): viz., by the complete omission from the deed of the phrase "during the life of the wife." There were apparently no children of the marriage. [His lordship then read cls. 1 (i.), 1 (iii.) and 3 (ii.) of the deed, and continued.] I can see nothing in these provisions to extend the husband's covenant beyond the term of their joint lives: everything presumes the continuance of his life during performance of the covenant to pay. This view of the agreement is supported by other terms in the deed. Everyone of these provisions seems to us in terms to assume that the husband is still alive and therefore to apply only to the period of their joint lives; thus distinguishing this deed of separation, on a radical point of its terms, from *Kirk* v. *Eustace* (2).

The widow before us, however, relied on two other grounds to support the contrary submission. The first was a contention that s. 80, sub-s. 1, of the Law of Property Act, 1925, in terms imposed such an obligation on the husband. The answer to that contention is twofold, first that a contrary intention is expressed in this deed: secondly—and this we add subject to what is said below in regard to the language of the noble Lords in *Kirk* v. *Eustace* (2)—that the effect of that section is not to create a liability on the personal estate, but to extend a pre-

(1) (1886) 31 Ch. D. 529.

(2) [1937] A. C. 491.

existing liability of that estate to the real estate. That this is the meaning of the sub-section is borne out we think by the terms of s. 59 of the Conveyancing Act 1881, the object of which was to extend to heirs an obligation not previously binding on them, but only on the personal estate.

The last argument for the widow was that even if the decision in *Kirk* v. *Eustace* (1) did not help her there were expressions of opinion by one if not two of the noble Lords which though not necessary to the decision, and therefore not actually binding on this court, gave support to his interpretation of the deed in the present case and ought with due respect to the House of Lords, to be followed by us. Lord Atkin said (2): " While it is " true that the covenant was not expressly made by the " covenantor for his executors and administrators," and after quoting the sub-section continued: " Therefore, this contract, " which is under seal, is to be read as if it were made by the " husband for his executors and administrators, unless a con- " trary intention is found expressed in the covenant. So far " the matter seems to me to be beyond question, and the wife " has the right expressed in the deed." Again, the noble Lord repeated (3): " the statute quite plainly imposes an obligation " which binds his estate unless a contrary intention is expressed. " I find no contrary intention expressed in the deed. If I had " to consider the intention of the parties at all I should have " come to the conclusion that their intention was that the " obligation was to last after the death of the husband; but it " is unnecessary to decide that." Lord Russell of Killowen (as well as the other noble Lords) based his decision, we think on the words of that deed " during the life of the wife ": and we cannot see in his decision any reference to any other ground of decision.

We are not sure whether it was suggested in argument that in a deed of separation there is a rule of law that covenants are to be construed as intended to bind the estate of the covenantor, but, if it was, we know of no such general rule. There is no question here of the scope or limitation of the maxim " actio " personalis moritur cum persona." There was no cause of action (except for the 14*l*.) which had arisen before the death: the only question is whether the promise to pay continued in force after the death so as to give rise at the end of each week to a new cause of action against the executor, if he did not recognize the covenant as binding on him. The question

(1) [1937] A. C. 491. (2) Ibid. 496. (3) Ibid. 497.

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whether such a contractual obligation passes to the executor must in our view depend on the terms of the contract which is supposed to pass it on. In the case of a promise of an essentially personal kind, such as to paint a picture, obviously it does not pass: but the reason it does not pass is because the contract truly interpreted did not intend it to pass. In other words the passing or lapsing of the promise on the death of the promisor must depend on the terms and nature of the contract, construed like every other contract in the light of its attendant circumstances. In the present case we can see no reason for construing the husband's covenant as intended to continue after his death. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the widow: *Ward, Bowie & Co., for Duggan, Elton & James, Birmingham.*

Solicitors for the executor: *Caporn & Campbell, for A. C. Hayes & Sheppard, Birmingham.*

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MORRIS *v.* LUTON CORPORATION.

Negligence—Personal injury—Contributory negligence—Duty of person riding or driving at night.

There is no rule of law that a person riding or driving in the dark must be held to be negligent if he is driving at such a speed that he is not able to pull up within the limit of his vision.

Dictum of Scrutton L.J. to the contrary in *Baker* v. *Longhurst & Sons, Ld.* [1933] 2 K. B. 461 at p. 468, disapproved, and dictum of Lord Wright in *Tidy* v. *Battman* [1934] 1 K. B. 319 at p. 322 approved and followed.

APPEAL from Cassels J.

During the hours of darkness, on December 13, 1941, the plaintiff, while lawfully riding a pedal cycle on a highway, collided with an unlighted air-raid shelter erected and maintained by the defendant corporation under statutory powers. The defendants denied negligence, and alleged contributory negligence. Cassels J. found that contributory negligence was not proved but gave judgment in favour of the defendants on the issue of negligence. He based his judgment (delivered on

November 8, 1944) on the authorities as they stood at that date before the decision of the Court of Appeal in *Fisher* v. *Ruislip-Northwood U.D.C.* (1). The plaintiff appealed, and on the appeal the defendants sought to displace the finding of no contributory negligence, relying on the judgment of Scrutton L.J. in *Baker* v. *Longhurst & Sons, Ld.* (2). It is only on this point that the case calls for a report, as on the issue of negligence the court held that it was indistinguishable from *Fisher's* case (1).

Fox-Andrews K.C. for the plaintiff.
Edgedale for the defendants.

The arguments appear sufficiently from the judgment.

LORD GREENE M.R. In this appeal Mr. Edgedale, for the defendants, put forward two arguments, one relating to negligence and the other to contributory negligence. As the latter formed the latest part of his address I will deal with it at once. Cassels J. found (on ample evidence), that the burden of proving contributory negligence had not been discharged. On that it seems to me, having seen the evidence, that his conclusion was undoubtedly right. Mr. Edgedale says that it was wrong because it violated a principle which he first described as a principle of law, and afterwards, alternatively, suggested was a principle of good driving or something like that. I need scarcely say that I refer to the well-known passage in the judgment of Scrutton L.J. in *Baker* v. *Longhurst & Sons, Ld.* (2), where, on a literal interpretation of his words, he appears to lay down a sort of general proposition that a person riding in the dark must be able to pull up within the limits of his vision. I cannot help thinking that that observation turned out in the result to be a very unfortunate one, because the question, as has been so often pointed out, is a question of fact. There is sometimes a temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps sometimes slips unconsciously—I may have done it myself for all I know—but it is much to be deprecated, because these are questions of fact dependent on the circumstances of each case. I cannot regard that observation of Scrutton L.J.'s

(1) [1945] K. B. 584.

(2) [1933] 2 K. B. 461, 468.

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as in any sense affecting other cases where the circumstances are different. In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observation of Lord Wright, sitting in this court in *Tidy* v. *Battman* (1). He says there, referring to *Baker* v. *Longhurst & Sons, Ld.* (2), and one other case, that they show " that no one case is exactly like another, " and no principle of law can in my opinion be extracted from " those cases. It is unfortunate that questions which are " questions of fact alone should be confused by importing into " them as principles of law a course of reasoning which has no " doubt properly been applied in deciding other cases on other " sets of facts." That was the observation of one member of this court. I now adopt it myself and, if my brethren take the same view on that, in future there will be the unanimous opinion of three members of this court that that is the law, and I hope that that may conduce to the certainty of the law in these matters.

On the question of negligence, his Lordship held that the case was exactly covered by *Fisher* v. *Ruislip-Northwood U.D.C.* (3), and that the appeal must be allowed.

MACKINNON L.J. I agree that the appeal should be allowed. I would add that I gladly accept the invitation of my Lord and desire to say that I agree with his observations in regard to *Baker* v. *Longhurst & Sons, Ld.* (2).

TUCKER L.J. I also agree, and desire to associate myself with the observations of MacKinnon L.J.

Appeal allowed.

Solicitor for the plaintiff: *W. H. Thompson.*
Solicitors for the defendant: *William Charles Crocker.*

(1) [1934] 1 K. B. 319, 322.
(2) [1933] 2 K. B. 461, 468.
(3) [1945] K. B. 584.

J. W. H.

ATHEL LINE, LIMITED *v.* LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED.

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Nov. 8, 9.

Lord Greene M.R., MacKinnon and Tucker L.JJ.

Insurance (Marine)—War risk—Warlike operation—Requisitioned vessel —Anchorage in unusual naval base to discharge cargo—Stranding at night on hidden and uncharted rock—Insurers' liability.

The motor tanker A. was requisitioned during the war by the British Government and, laden with fuel oil, was on a voyage from Trinidad to Lochalsh and Scapa Flow under a government form of charter. On arrival in Scottish waters on November 26, 1942, the vessel was directed by the naval authorities to an anchorage in Lochalsh harbour, a temporary war naval base, there to discharge a part of her cargo into a naval vessel. While swinging and ranging to her anchor during the night before proceeding alongside the receiving vessel, she stranded on an invisible and unknown rock and sustained damage to her hull. There was no question of negligence in her management or navigation. The claim of the owners to be indemnified under the terms of a war risk policy, which (inter alia) insured the vessel against damage suffered during any warlike operation, was resisted by the insurers on the ground that the war risk had ceased when the vessel came to an anchor in Lochalsh harbour:—

Held (affirming the decision of Atkinson J.) that the vessel was, at the time of the damage, engaged on a warlike operation, and that the damage was a consequence of that operation, which was not suspended by the fact that she was riding at anchor, and not "proceeding through the water." The expression "proceeding "through the water," which is found in some of the cases, is a mere description of the state of facts which happened to exist in those cases, and lays down no criterion for the determination of the question whether a vessel is engaged on a warlike operation at a given moment.

APPEAL from Atkinson J. (1).

The claimants, Athel Line, Ld., claimed to be indemnified by the respondents, Liverpool & London War Risks Insurance Association, Ld., under a marine time policy of war risk insurance dated April 24, 1940, for damage sustained by the motor tank vessel *Atheltemplar* on November 27, 1940, in the naval harbour of Lochalsh, situated between the Isle of Skye and the mainland of Scotland. The vessel at the material time was under requisition by the Ministry of War Transport and had left Trinidad, West Indies, on October 19, 1940, on a voyage towards Lochalsh and Scapa Flow for the purpose of there discharging and delivering her cargo of fuel oil in accordance with the orders of the government time charterers. Lochalsh was at that date under the control of a King's harbour master, and was being used solely for naval purposes.

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(1) [1945] K. B. 567.

The material clause of the war risk policy was as follows:—"This insurance is only to cover the risks (in this policy referred "to as 'King's Enemy Risks') of capture, seizure, arrest, "restraint, or detainment by the King's enemies and the "consequences thereof, or of any attempt thereat; also of the "consequences of hostilities or warlike operations by or "against the King's enemies whether there be a declaration "of war or not; but excepting civil war, revolution, rebellion, "insurrection and civil strife arising therefrom, and piracy."

The following facts were agreed between the parties: While at anchor in the conditions which prevailed the *Atheltemplar* was subject to constant movement in the water, in addition to her sheering and swinging to the tide when it commenced to flow on November 26 and to ebb on November 27. Active watches were kept on the vessel while at anchor, observation was kept of her position and throughout the night the anchor cable was watched and tended by those in charge of it under the direction of those on board. At daylight on November 27 it was discovered by soundings that the vessel had grounded and was fast on a rock under number 8 tank, slightly on the starboard side. She floated off on the rising tide, and proceeded, at the direction of the King's harbour master, with the assistance of naval tugs, alongside the naval depot vessel, into which she discharged about 7,150 tons of oil. The naval authorities then ordered the *Atheltemplar* to proceed to Scapa Flow to discharge the remainder (about 5,350 tons) of her cargo there. She completed discharge on December 12, 1940. By reason of the grounding at Lochalsh the *Atheltemplar* sustained considerable damage to her hull and bottom, the extent of which was not known until survey in dry dock at North Shields, and the damage and cause thereof were then reported to the King's harbour master at Lochalsh.

Before the arbitrator, Mr. F. A. Sellers, K.C., it was contended by the claimants that the *Atheltemplar*, at the time of the ground, was engaged in a warlike operation, and the damage was a consequence of such warlike operation. It was contended on behalf of the insurers that the vessel was not, at any time in the course of the voyage from Trinidad to Lochalsh, on a warlike operation, but that if she were so engaged the warlike operation ceased when she dropped anchor at Lochalsh, and the damage sustained by the stranding was not the consequence of any warlike operation on which the vessel was then engaged. The arbitrator held that at all material times the *Atheltemplar* was on a warlike operation, that the damage caused to her by the grounding was a consequence of warlike operations, and that the claimants were entitled to be indemnified by the respondents. Atkinson J., having affirmed the arbitrator's decision, the insurers appealed to the Court of Appeal.

Sir Robert Aske K.C. and *Devlin K.C.* for the insurers. The material words of the policy are "consequences of "hostilities or warlike operations by or against the King's "enemies," and the relevant questions on the issue whether the plaintiffs are entitled to recover for damage to their ship or (1.) what was the operation on which the ship was engaged? (2.) was it a warlike operation? and (3.) was the damage to the ship due to the operation being performed? The operation was that of bringing a cargo of petrol to Lochalsh, which was a war-base, and after it was in part unloaded, of proceeding to Scapa Flow. That was clearly a warlike operation, but the damage to the ship was sustained while she was at anchor at Lochalsh before being unloaded. During that time the operation was suspended. [They referred to *Yorkshire Dale Steamship Co.* v. *Minister of Transport* (1).] The damage was not caused by any action performed in the course of carrying out a warlike operation. The ship was stationary at anchor subject only to the effects of wind and tide.

Willmer K.C. and *Hodgson*, for the claimants, were not called on to argue.

LORD GREENE M.R. The subject-matter of this controversy has been obscured in the past by a good many difficulties, but in my opinion the answer in this case is perfectly simple. The questions which we have to decide turn on the true meaning of those much debated words in a policy of war risk insurance which cover the consequences of hostilities or warlike operations by or against the King's enemies. The two questions which fall for consideration are these: first, was the vessel, at the moment when she suffered damage, engaged in a warlike operation? and, secondly, if she was so engaged, or

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(1) [1942] A. C. 691, 696.

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even if she was not so engaged, was the damage that she suffered a consequence of a warlike operation ? The first question as I have stated it is, I apprehend, a mixed question of law and fact. What we have to decide is whether the facts as found by the arbitrator support his opinion that a warlike operation was in progress at the moment that the damage took place. I should have no hesitation in answering that question in the affirmative, and I cannot myself see how, on the facts as found by him, he could have come to any other conclusion. The only ground put forward in support of the view that at this particular moment the vessel was not engaged on a warlike operation is the circumstance that she was not moving through the water but was riding at anchor and it is said that that has been laid down in the House of Lords as the appropriate and crucial test.

There are two distinctions which must always be remembered. One is the distinction between the two quite separate questions, was a warlike operation in progress ? and was the damage a consequence of a warlike operation ?—and the other is the distinction to be drawn between the case where a vessel engaged on an ordinary mercantile voyage suffers a casualty, and the case where a vessel engaged on a voyage which in itself is a warlike operation, such as the present case, suffers a casualty. In the former case something more than the mere character of the voyage is necessary to bring into existence a warlike operation, such as some manœuvre that the vessel in question carries out, or some impact upon the vessel through some outside source. If for instance, a vessel engaged on an ordinary mercantile voyage takes evasive action to avoid a submarine and thereby runs on a rock, it may very well be that the mere taking of that evasive action in the circumstances converts the situation into a warlike operation, which it was not before. Similarly, if the vessel is hit by a torpedo from a submarine, that does not make her engaged in a warlike operation, but the damage to her would be the consequence of a warlike operation. But, when the voyage itself is a warlike operation, the importance of a manœuvre by the vessel to bring about a warlike operation largely disappears. The anchoring of this vessel at that point, in those circumstances, at that time, was an essential part of the operation on which she was engaged, namely, the conveyance of war stores from one base to another base. It was impossible for her to discharge her cargo at Lochalsh the moment she arrived, and she was bound to anchor as a necessary step in fulfilling her ultimate object, namely, the discharge of her cargo. It seems to me to violate all one's conceptions of common sense to say that the warlike nature of her occupation ceased when she dropped her anchor and was only resumed when she pulled it up again. The riding at anchor, when she did ride at anchor, was an essential part of the carrying out of the object of her voyage. It seems to me to be completely artificial to treat that period of time when she was riding at anchor as something which can be severed from the totality of the operation which began when the vessel was loaded with petrol at Trinidad and ended when she finally discharged it.

I am of opinion, therefore, that that argument fails, but I must say something about the way in which the authorities were presented to us and the arguments based upon them. The high water mark, I think, of the proposition that, in such a case as this, where the voyage is a warlike operation, there must be, at the moment of injury, some movement of the vessel through the water, is to be found in the words of Lord Porter in the recent case of *Larrinaga Steamship Co., Ld.* v. *The King* (1), in which he sums up what he considers to be the result of some of the earlier authorities. He says this: " There is " abundance of authority in your Lordships' House that a " ship engaged in carrying war stores from one war base " to another, or indeed in carrying war stores to a war " base, is engaged on the warlike operation of proceeding " through the water to her appointed discharging port." We find in earlier cases, where the vessel was in fact proceeding through the water at the relevant time, the same references to " proceeding through the water." Those references, I apprehend, arose because that happened to be the fact in those particular cases. I cannot read these passages as in any way laying down a proposition which was not under discussion at all, namely, that if the vessel has halted—whether because she has stopped her engines and come to rest or because she has cast anchor in addition—that circumstance is really a crucial matter of distinction. Lord Porter, when he used that expression, was only engaged in summarizing the effect of what had gone before in cases where, as I say, the vessel was in fact moving through the water; and I venture to think that the noble and learned Lords who had preceded him, and Lord Porter himself, would have been surprised to find that in that

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(1) [1945] A. C. 246, 257.

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phrase he was for the first time laying down a fundamental criterion of distinction in these cases, namely, that movement through the water is an essential element in constituting a warlike operation. All that he meant was that there the warlike operation was the act of proceeding from point to point. It is the general voyage from point to point that constitutes the warlike operation. I find myself quite unable to accept the view that any such criterion has been laid down, and, speaking for myself, it is one which does not in any way appeal to whatever common sense I may happen to possess.

The other question is that of consequence. The legal theory of causation has, in the course of years, had a remarkable history, but the point at which it appears to have come to rest at the moment, is that which lays it down that this type of question of causation is really a matter for the common sense and intelligence of the ordinary man; and in any individual case, where a tribunal of fact such as an arbitrator or a jury has found without misdirection in law that A is the consequence of B, the only question that an appellate tribunal can consider is whether the facts as found are sufficient in law to justify a finding that the one is the consequence of the other.

In so far as it is for me to express my own opinion on the present case, I should have felt not the slightest difficulty in coming to the conclusion—and, indeed, I should have felt myself forced to come to the conclusion—that the damage that took place was a consequence of the warlike operation. That is on the footing that my view is right as to the existence of the warlike operation at the moment when the damage took place. That was the view of the arbitrator, and of Atkinson J., and in my opinion the facts not only are sufficient to support that view but really prevent one from drawing any other conclusion. But it is perhaps desirable also to add this, that even if the suggested criterion of movement through the water was correct, so that at the precise moment when this vessel, riding, as she was, at anchor, suffered damage, she was not engaged on a warlike operation—I should still be of opinion that the damage that she suffered was a consequence of her warlike operation, which, on that hypothesis, ended or rather was temporarily suspended, at the moment when she cast anchor. Down to the point when she cast anchor she was unquestionably engaged in a warlike operation. If the point at which she came to rest in execution of the operation happened to be one of concealed danger, the fact that that danger only materialized after several hours would not, in my view, make the damage any the less a consequence of the previous act of the vessel in coming up to that point and casting anchor there.

That seems to me to be a perfectly clear conclusion, and in my opinion this appeal fails and must be dismissed with costs.

MacKinnon L.J. If I were free to consider this case as the first one that had ever arisen on the construction of these words, I should have agreed with the appellants' proposition that this damage would be recoverable against an underwriter as a loss by perils of the sea and that the underwriter could not escape liability by reliance on the clause " free from the consequence of a warlike operation." I should have held that the vessel was engaged in a warlike operation, but that the damage to her by perils of the sea, while she was so engaged, was not a consequence of the warlike operation. I should so have held for the reasons that I tried to state in *Yorkshire Dale Steamship Co.* v. *Minister of Transport* (1). The House of Lords has made me realize that I was wrong in that view, and therefore as I was wrong, and as the House of Lords held that the underwriter, faced with the claim, could successfully plead that that damage to the *Coxwold* was the consequence of a warlike operation, it seems to me to follow that in the present case the underwriter must be entitled to say that the damage to the *Atheltemplar* was the consequence of a warlike operation. As far as I can formulate any principle for the decision in the *Coxwold* case, I think that principle must result in the same decision in the case of this ship, the *Atheltemplar*, and I therefore agree that the appeal must be dismissed.

Tucker L.J. : I agree and have nothing to add.

Appeal dismissed.

Solicitors for insurers : *Thomas Cooper & Co.*
Solicitors for claimants : *Hill, Dickinson & Co.*

J. W. H.

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(1) [1942] 1 K. B. 35, 43.

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May 30, 31;
June 1, 4;
July 17.

Scott,
Lawrence L.JJ.
and
Uthwatt J.

LEACHINSKY *v.* CHRISTIE AND OTHERS.

Criminal law—Arrest—Charge of statutory misdemeanor—Illegal arrest without warrant—Subsequent justification on ground of reasonable suspicion of felony—Ground not communicated at the time to person arrested—False imprisonment.

The plaintiff was arrested without warrant under a local Act on a charge of unlawful possession of goods in circumstances which rendered the arrest unlawful. When sued for false imprisonment by the plaintiff, the defendants, who were police officers, sought to justify the arrest on the ground that at the time of the arrest they suspected and had reasonable grounds for suspecting that the plaintiff had stolen the goods, although they had not then informed the plaintiff of this. Stable J. on this issue found in favour of the defendants and gave judgment for them. On appeal:—

Held, by Scott L.J. and Uthwatt J.—(1.) that where a person is arrested without warrant with a view to prosecution for a misdemeanor, in circumstances where it is not lawful to arrest without warrant for that misdemeanor, it is no justification in an action for false imprisonment that the arresting police officer at the time of the arrest suspected on reasonable grounds that the person arrested had committed some felony, and (2.) further, to support a plea of justification (*a*) the arrest must be on a definite charge present to the mind of the arresting officer, (*b*) per Scott L.J. in terms (Uthwatt J. concurring with the judgment of Scott L.J. but not dealing expressly with the point) that the charge in the mind of the officer must be expressly stated to the person arrested at the time of the arrest.

Lawrence L.J. concurred in holding the arrest unlawful on the ground that a different conclusion was precluded by the decision in *Dumbell* v. *Roberts* (1944) 42 L. G. R. 111.

APPEAL from Stable J.

Action brought by the plaintiff, Leachinsky, against the defendants, detective-constable Christie, detective-sergeant Morris and other members of the Liverpool police force, for damages for false imprisonment.

The facts, which are substantially taken from the judgment of Scott L.J., were as follows: The plaintiff, a Russian Jew brought here as a child about 1891, on August 31, 1942, was arrested by the defendants without a warrant, the police officers purporting to act under the Liverpool Corporation Act, 1921 (1).

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(1) Liverpool Corporation Act, 1921 (11 & 12 Geo. 5, c. lxxiv.), s. 507: "(1) Any person brought "before any court of summary "jurisdiction charged with having "in his possession any thing which "there is reasonable ground to "believe or suspect has been

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He was a "waste" merchant dealing inter alia in the waste materials of tailoring businesses, and had carried on his business in Liverpool since 1937, at 196-198 Beaufort Street, where he was arrested. Both this and his private address were known to the defendants at the time of the arrest. On August 26 the plaintiff bought three bales of waste cuttings for 4*l.* 6*s.* 0*d.* from a firm called Michaelson in Leicester, with which firm he had been dealing for some four months. He stated that he had incidentally asked Michaelson if he had any "remnants" out of which to make a dress for his wife, and in the result he bought all there were for 22*l.*, paying cash, and the material was packed into a single bale, referred to as the bale of cloth. The contents included linings and stockinette as well as cloth. He then carried off the four bales with twenty-three others purchased elsewhere, describing the lot for the purpose of the carriers' charges as "waste," thus misdescribing the bale of cloth. On August 31, the defendants, apparently having some suspicion, came to the Beaufort Street warehouse to watch the delivery of the bales, but did not announce their presence to the plaintiff, who was there helping to carry the bales into the warehouse. The bales of waste proper had to be weighed, but it was unnecessary to weigh the bale of cloth, as it had not been bought by weight, and accordingly it was left outside at the back of the warehouse. The defendants then came in and in effect taxed the plaintiff with having described the bale of cloth as waste, and not being satisfied with his answers arrested

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" stolen and who does not account
" to the satisfaction of the court
" for his possession of the same
" shall be liable to a penalty not
" exceeding five pounds or in the
" discretion of the court to im-
" prisonment for any time not
" exceeding two months with or
" without hard labour. (2) If any
" person so brought before any
" court shall declare that he
" received such thing from some
" other person or that he was em-
" ployed as a carrier agent or
" servant to convey the same for
" some other person such court
" shall cause such other person
" and also if necessary every
" former or pretended purchaser
" or other person through whose
" possession the same shall have
" passed to be brought before a
" court and examined . . . .
" (5) For the purposes of this
" section—the expression . . . .
" 'stolen' means stolen or un-
" lawfully acquired or detained."

Section 513: " It shall be lawful
" for any police constable and all
" such persons as he shall call to
" his assistance to arrest and
" detain without warrant (I.) Any
" person whose name and resi-
" dence shall be unknown to such
" constable and cannot then be
" ascertained by him and who shall
" commit any offence against
" (inter alia) (A) the provisions of
" . . . . this Part of this Act."

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him on a charge of unlawful possession under the Liverpool Act. As they knew his name and address the arrest was not authorized by the Act, as the defendants knew. Their excuse, for the first time put forward in their amended defence, was that at the time they arrested him they reasonably suspected him of larceny. In cross-examination their excuse for purporting to arrest him under the Liverpool Act was that it was "convenient" so to do. Nothing was said to the plaintiff by the defendants at the time of the arrest about stealing.

On September 1, the plaintiff was remanded; on September 8 he was brought up again and the Liverpool police, misled by Michaelson, asked leave to withdraw the charge of unlawful possession, having decided to prosecute for larceny. On September 15 the stipendiary magistrate discharged the plaintiff, but as he was leaving the dock the defendant Christie detained him, and kept him in the cells until the arrival of the Leicester police. Subsequently he was charged at Leicester before the magistrates with larceny, but Michaelson broke down under cross-examination and the magistrates dismissed the charge. In an action against Michaelson for libel the plaintiff recovered 250*l*. damages and he then brought the present action before Stable J., who allowed an amendment of their defence by the police, in which they alleged that the arrest was made on the common law footing of a reasonable suspicion of felony. The original averment was of arrest under the Liverpool statute only. Stable J. gave judgment for the defendants, and the plaintiff appealed.

Laski K.C. and *Rose Heilbron* for the plaintiff.
Hemmerde K.C. and *Nelson K.C.* for the defendants.

Cur. adv. vult.

July 17. The following judgments were read. SCOTT L.J. [after stating the facts]. It is the claim by the executive to a discretionary power of arrest without warrant, outside the statute, coupled with an attempted justification after the event under a common law power to arrest —exercisable only in certain circumstances and only for a specific purpose—that makes this appeal so important to the public, for it is obvious that it raises questions about the law of arrest which affect essential principles of the British Constitution and are of supreme importance to individual liberty. Indeed, both directly and indirectly, the judgment below cuts down in far-reaching ways the freedom under the general law from liability to arrest by the executive without judicial warrant, which, apart from war legislation, original and delegated, every individual person within the King's allegiance enjoys to-day. That freedom from liability to non-judicial arrest by the executive is absolute, unless the arrest falls within one or other of the clearly defined cases where the law allows it. Claims to such a power have in the past been put forward on behalf of a Secretary of State (see Halsbury's Laws of England (2nd ed.), vol. VI., p. 663, para. 863), but have no foundation at common law except on a charge of high treason : see note (*t*) to that paragraph, and the decision, there cited, of the Court of King's Bench in *Entick* v. *Carrington* (1). In that case a Secretary of State had issued a warrant purporting to authorize the defendants to break into the plaintiff's house and seize his papers ; and the defence relied on such a practice of nearly eighty years standing as showing that the executive had such a power at common law : but the court held that the Secretary of State had no such power and that the acts of breaking, entering and seizure effected under the warrant were illegal : and further, that the practice in question could not alter the law. Lord Camden C.J. in delivering the judgment of the court, said : "I can safely answer there is no law in this "country to justify the defendants in what they have done : [if "there was] it would be subversive of all the comforts of "society" (2).

To appreciate the momentous significance of the normal rule of personal freedom within the law it is helpful to contrast that rule with its extreme opposite in the legislative grant, for war purposes, of arbitrary power to the executive, which took shape in Defence Regulation 18B. Parliament, by s. 1, sub-s. 1, of the Emergency Powers Defence Act, 1939, passed on August 24, 1939, gave practically unlimited powers to His Majesty—i.e., to the executive—by Order in Council to "make such regulations . . . . as appear to him to be "necessary or expedient for securing the public safety "[and] the defence of the realm." Sub-section 2, without prejudice to the above general powers, provided that Defence Regulations might " (*a*) make provision for the . . . . deten-

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(1) (1765) 19 St. Tr. 1029. (2) Ibid. 1066.

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" tion of persons whose detention appears to the Secretary of " State to be expedient in the interests of the public safety or " the defence of the realm." The first Order (No. 927, passed in Council on August 25, 1939) did not contain any regulation for detention. That provision was however, made on the day the war began by Order No. 978 of September 1, and in it the much debated regulation 18B appeared in its first form, providing that the Secretary of State " if satisfied, with respect " to any particular person, that with a view to preventing him " acting in any manner prejudicial to the public safety or the " defence of the realm, it is necessary so to do, may make an " order . . . . (*c*) directing that he be detained "; and adding that a person so detained " shall . . . . be deemed to be " in legal custody." By subsequent amendment, made by Order No. 1681 of November 23, 1939, an amended 18B was passed, and its first paragraph ran : " If the Secretary of State " has reasonable cause to believe any person to be of hostile " origin or associations or to have been recently concerned in " acts prejudicial to the public safety . . . . he may make an " order " of detention ; and that is the form which was subsequently the subject of litigation up to the House of Lords.

I call attention to this legislation just because it affords the most extreme contrast I know to the general rule of the freedom of the individual within the realm as recognized by our law in peace-time. The 18B power of arbitrary detention by the executive, created by emergency legislation for war purposes only, is the very antithesis of the ordinary legal rule that no one can be arrested at all, unless the law itself confers the power. The legal powers so conferred are quite clear. I will take the common law point first. For the purpose of a criminal proceeding the common law concedes to a constable the power of arrest without warrant in the case of a suspected felony : and indeed imposes on him a duty to do so : Archbold's Criminal Pleading (31st ed.), p. 1005 ; Stephen's History of Criminal Law, vol. I., p. 494 ; Kenny's Outlines of Criminal Law (15th ed.), pp. 529, 530. It concedes the same power even to a private person, though to him only if that felony has in fact been committed (*Walters* v. *Smith* (1)) ; whereas to a constable it gives the power of arrest on suspicion of felony, whether a felony has been committed or not. But even for suspected felony neither private person nor constable can arrest unless he has reasonable grounds for his suspicion. The limited scope of arrest on suspicion is brought out by the contrast of full knowledge: for both a constable and a private person not only may, but must, arrest any person who, in his presence, commits a felony (2 Hawkins' Pleas of the Crown, ch. 12, s. 1, and ch. 13, s. 7); and if a person is about to commit a felony, or even a breach of the peace, even a private person may detain him temporarily, until the danger is over (*Timothy* v. *Simpson* (1)).

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(1) [1914] 1 K. B. 595.

On the other hand, at common law no offence of less gravity than felony (for which it should be remembered the penalty at common law was always death) subjects the offender to arrest without warrant, even at the hands of a constable. Except in the case of an actual breach of the peace no person —whether public or private—has by the common law any power of arrest for misdemeanor. These common law principles were practically settled by the time of Sir Matthew Hale (1609-1676). though it is probable that, in the Middle Ages, they could not have been expressed in the form stated above (2 Hale, History of Pleas of the Crown (3rd ed.), chs. X.-XII.; Holdsworth, History of English Law, vol. III., ch. VI. on Process, at p. 603). In the course of English history a good many statutes, some general, some local, have been passed conferring, chiefly on constables, power to arrest without warrant for various misdemeanors, or offences punishable on summary conviction; see, for instance, the Town Police Clauses Act, 1847, s. 28 (which specifies some thirty such offences), but in every such case the exercise of the statutory power is conditioned by the express terms of the enabling statute; and many contain special safeguards for the protection of the individual. An illustrative list of such statutes is to be found in the article on Criminal Law and Procedure by that great master of that subject, the late Avory J. in vol. IX. of Halsbury's Laws of England, 2nd ed., at pp. 89 to 95, in the notes to para. 119. It will be observed that the condition attaching to the power of arrest under the Liverpool Act, namely, that the constable does not know and cannot ascertain the name and address of the person arrested, appears in several of the statutes cited on pp. 92 to 95 of Halsbury. If a constable arrests when he does know, or could ascertain, the name or address of the person arrested, the arrest is without legal authority and therefore wrongful—as Avory J. said in para. 121 of the above article, at p. 96.

(1) (1835) 1 C. M. & R. 757.

The very essence of the law of arrest of a person suspected of an offence is that arrest is the first step in an intended criminal proceeding against that person. This is very simply stated in the above article by Avory J. in para. 102 at p. 77: "The first step in the ordinary course of criminal procedure "is to bring a person charged with a crime before a justice "or justices of the peace in order that the charge "may be investigated. The attendance of an accused person "before justices is secured either by summons or by arrest, "either under or without a warrant. Summonses and warrants "of arrest are issued by a justice on an information being laid "before him. A warrant of arrest may issue on a summons "being disobeyed, or may issue in the first instance. "Summonses, warrants, and arrests are mere machinery for "securing the attendance of an accused person." Arrest without warrant obviously cannot have been allowed by the common law for a different purpose, or within laxer limitations than arrest under warrant: but in a warrant, as in a summons, the nature of the charge had always to be stated (see s. 103 of the same article). Section 32 of the Criminal Justice Act, 1925, provides that "Every information, complaint, summons, "warrant or other document laid, issued or made for the "purpose of or in connexion with any proceedings . . . . shall "be sufficient if it contains a statement of the specific offence." That provision is in substance very old law. Section 103 of Avory J.'s article is to the same effect. An information to found the warrant must be in writing and on oath (ibid. para. 105); and it cannot (unless the particular statute concerned provides otherwise) include more than one offence either conjunctively or disjunctively; for in the former case it would raise two issues, which infringes the rule against duplicity, and in the latter would fail to give effect to the principle that an accused person has a right to know what the charge is against him and would therefore be bad for uncertainty.

The broad view that arrest has always been a step in procedure, and therefore strictly limited by the objective to which the proceedings are addressed, is made clear in Stephen's History of the Criminal Law (1883), vol. I., ch. VII., at p. 184: "Having in the last chapter traced the history of the courts of "a criminal jurisdiction, I now proceed to the history of the "procedure followed for the punishment of criminals. I shall "give the history of each step in the procedure separately,

" and I intend in the present chapter to treat of the procedure " from the arrest of the offender to his discharge or committal " for trial. This consists of two stages, namely, the apprehension of the offender, closely connected with which is the " law as to the suppression of offences, and the preliminary " investigation before a magistrate, which results in the " discharge, or committal for trial, or bailing of the supposed " offender." In that chapter he is considering early history. At p. 493 of ch. XIV. he is discussing contemporary procedure. " In England," he writes, " and, so far as I know, in England " and some English colonies alone, the prosecution of offences " is left entirely to private persons, or to public officers who act " in their capacity of private persons and who have hardly any " legal powers beyond those which belong to private persons. " Incidentally this has already appeared in the course of this " work, but I may now put together what has already been " stated. The police in their different grades are no doubt " officers appointed by law for the purpose of arresting " criminals ; but they possess for this purpose no powers which " are not also possessed by private persons . . . . A policeman " has no other right as to asking questions or compelling the " attendance of witnesses than a private person has ; in a " word, with some few exceptions, he may be described as a " private person paid to perform as a matter of duty acts " which, if so minded, he might have done voluntarily." Parenthetically I ought to add that in quoting Stephen's reference to the absence of any special power vested in the police to question a person with a view to or after arrest, I am not forgetting the Judges' Rules about questioning : see Archbold's Criminal Practice (31st ed.) at pp. 371-372. On pp. 496-497 Stephen describes the change in trial by jury from an investigation by men knowing the facts to a consideration of evidence tendered to them by others, and the change in the function of justices of the peace from quasi-prosecutors to committing magistrates, and then on p. 497 continues with this very significant passage in connexion with his comparison of the English system with foreign systems : " It was thus by a series of omissions on the part of the " legislature to establish new officers for the administration of " justice as the old methods of procedure gradually changed " their character, that English criminal trials gradually lost " their original character of public inquiries, and came to be " conducted in almost precisely the same manner as private " litigations."

The last quotation makes pertinent a reference to the parallel of civil proceedings. There too in the history of our law arrest played a prominent part; and though in course of time in the courts both of the Common Pleas and the King's Bench it became the normal first step, or almost the first step, in procedure in an action, originally its object was to secure the appearance of the defendant before the court in response to the original writ issuing out of the Chancery, for if the writ of attachment or "pone per vadios et salvos plegios" failed to induce the defendant to give security for his appearance, there was no other method of ensuring his presence before the court, especially in the days when appearance could not be made by attorney. At common law before the Statute of Westminster II. it was in general necessary for both plaintiff and defendant to appear in person, as, without the King's special warrant, appearance by attorney was impossible: see Tidd's Practice (ed. 1829), vol. 1, at p. 92. There were various judicial writs, addressed by the courts to the sheriff for the arrest of an intended defendant. That of capias quare clausum fregit, which even came by degrees to be an assumed fiction for the purpose of founding jurisdiction was one: another was the writ of capias ad respondendum: see the precedent printed in full in Blackstone's Commentaries (8th ed.), Bk. III., in appendix No. III. p. xiv.: "Capias ad respondendum. "George the second by the grace of God of Great Britain, "France and Ireland king, defender of the faith, and so forth; "to the sheriff of Oxfordshire, greeting. We command you, "that you take Charles Long, late of Burford, gentleman, if he "may be found in your bailiwick, and him safely keep, so that "you may have his body before our justices at Westminster, "from the day of Easter in five weeks, to answer to William "Burton, gentleman, of a plea, that he render to him two "hundred pounds, which he owes him and unjustly detains, as "he saith: and whereupon you have returned to our justices "at Westminster, that the said Charles hath nothing in your "bailiwick, whereby he may be distreined. And have you "there then this writ. Witness Sir John Willes, knight, "at Westminster, the sixteenth day of April, in the twenty-"eighth year of our reign. Sheriff's return. *Non est inventus.* "The within-named Charles Long is not found in my bailiwick." The learned author deals with the topic of arrest in his ch. 19 of Bk. III. entitled "Of Process," and there (on pp. 280 to 290) he explains the procedure in the court of Common

Pleas where the arrest was by capias and in the King's Bench where it was by " bill "—" a kind of capias " (p. 285). " Distress infinite," under which repeated distresses levied upon the defendant's goods could go on for ever, was a felicitous substitute for the compulsion of arrest in the case of—for example—peers and members of Parliament, who by law could not be arrested : (ibid. pp. 288, 289). The institution of the proceeding coram judice depended in legal theory on bringing the defendant bodily before the court, just as much as the satisfaction of the judgment, when given, depended on taking his body by way of ca. sa. till he paid.

The preceding references to and reflections on our old procedural law, justify, I think, the following conclusions as to a constable's power of arrest : (1.) Arrest on a criminal charge always was and still is a mere step on the procedural road towards committal, trial, verdict, judgment, and punishment—or acquittal, as may result : (2.) The power of arrest conferred by the law is limited to the purpose of the particular proceeding scil. the specific charge formulated ; (3.) The arrest must be made on that charge only ; and the person arrested must be told by the constable at the time of arrest what the charge is. The constable cannot lawfully keep an open mind, and remain still undecided at the moment of arrest : he must make up his mind and formulate the charge on which he decides, and then arrest on that charge ; (4.) If, having told the accused, before arresting, what the charge is, he then either changes his mind or becomes undecided, he has no longer any power to arrest on that charge ; and if he does so arrest, he acts illegally and is guilty of the tort of false imprisonment ; (5.) If he arrests on a specific charge, but before he has brought the prisoner before the appropriate judicial authority he changes his mind and decides to keep him on another charge, his power to detain automatically ceases and it becomes his immediate legal duty then to release the prisoner and make a new arrest on the new charge. To prevent misunderstanding, it is well to add, that in discussing the procedural character of arrest without warrant (whether by a constable or a private person) and pointing out how limited is the scope of the power conferred by the law, I am, of course, not suggesting that the initial absence, or the subsequent cessation, of the legal right to arrest or detain will of itself affect the jurisdiction of the court to deal with the accused person when he has once been brought before it. Quite different considerations apply to that question. Neither the committing magistrate nor the trial court will lose jurisdiction merely because it appears by evidence or admission that the prisoner has been arrested in circumstances which, for any of the reasons I have stated, made the arrest unlawful, although that fact may well influence discretion as to bail; but the person so wronged will have his cause of action against the person who arrested him unlawfully; and in an action for false imprisonment every harm to the plaintiff causally resulting from the original wrong will be matter for the jury to consider in assessing the quantum of general damages, and of course it is open to the jury to give exemplary damages. Again, to prevent misunderstanding, it may be well to point out that once a prisoner has been lawfully arrested on a definite charge, and brought before a magistrate's court for committal, there is nothing in the law of arrest to prevent a more serious charge being added to or substituted for the existing charge. That question appertains not to the law of arrest but to the procedural law of the court.

The aspect of the law of arrest which is most directly relevant to the present appeal is that of the purpose for which the arrest is made. The ultimate object which the law has in view in authorizing arrest is, of course, the protection of society, but arrest is not an end in itself. What the law grants is not a right, but only a power, although it may also be imposing a duty, especially on a constable. When effected, the arrest is in essence just a step in the administration of criminal justice, and not the less so because it is the first step, or at any rate the first step inter partes—for process may begin by information and warrant, or summons, at a stage before the accused is involuntarily made party to the lis between the prosecutor and him. It is by bringing him in person before the court, whether committing magistrate or judge and jury, that he is made a party, and the whole purpose of arrest, just as much as of the initial steps of information, warrant or summons, is to give the court jurisdiction over the alleged offender, in order that justice may be done, and that he, if found guilty, may be punished. The corporal presence of the offender is just as essential to trial, verdict and judgment, as to punishment, and, if he be innocent it is equally essential to him, as well as to the prosecution. English justice could not be what it is without that fundamental feature. In short, in our administration of justice the presence of the offender is basically the original starting point of any criminal proceeding: and none the less so because on the one hand bail may be substituted for the body of the accused by judicial order, or on some occasions at the early stage before he comes before the magistrate, by permission of the executive, namely, the police: and on the other hand the presence of the accused in court is not essential in some summary cases. Consideration of the last mentioned requisite of criminal procedure—the presence of the accused in court, which apart from minor exceptions is essential,—leads logically to another essential rule of this branch of law, which also is pertinent to the present appeal. An arrest must not only be on a definite charge and for the purpose of prosecuting that charge, but it must be expressly stated at the time to be on that charge. The law does not allow an arrest in vacuo, or without reason assigned, and the reason assigned must be that the arrest is for the purpose of a prosecution on the self-same charge, as is the justification for the arrest. It follows, and it is a principle lying at the very roots of English freedom, that if a man is arrested on one charge he is entitled to his release the moment the prosecution of that charge is abandoned. The prosecution cannot arrest on one charge, abandon their intention to proceed on that charge and then keep him in cold storage, still nominally on that charge, while they inquire into the possibility of putting forward a different charge. To do that they must first release him: then, when they propose to put forward some other charge, they can make that new charge the occasion of a new arrest. That is still the law to-day, when the vast majority of prosecutions are public, just as truly as it was in earlier times when they were mostly private; and by public and private I mean conducted by a public authority and by a private individual respectively.

It follows from what I have said that the practice, if there be one, which the learned judge obviously had in mind, of arresting a supposed murderer, for instance, on a minor charge, as a means of preventing his escape from justice at a time when the police suspect, but have not sufficient clues to constitute reasonable and probable cause for arresting the suspect for the suspected crime, is in my opinion illegal, and gives the person arrested a cause of action for false imprisonment. In practice the police would, as a rule, incur no liability for substantial damages, except where their anticipatory suspicions prove ill-founded, but it is important, for the sake of the great principle of the liberty of the subject, that the illegality of the practice should be widely known to judges, to the legal profession, to the police and to the public. It is better that an occasional criminal should escape punishment, than that the judges should let in the thin edge of the wedge for discretionary arrest at the instance of the executive. The rule of law to-day is that unless the limiting conditions at common law, or by statute, are strictly observed by the constable, the arrest he makes is illegal and constitutes an actionable wrong for which the arrested person may sue him in trespass, the damages being at large. It is this right of action in the King's courts for any unauthorized arrest or detainment by the executive which, above all other legal rights, is, under our constitution, the foundation upon which the freedom of the individual rests. And it is because in my opinion the judgment of the learned judge fails to give effect to this principle of freedom that I regard this appeal as one of supreme importance, and it is for that reason that I have in this judgment invoked the contrast of Defence Regulation 18B. Parliament thought right to confer on the executive (acting through the machinery of Orders in Council) an unfettered arbitrary discretion to arrest any person if it thought it unsafe to leave that person at large. As I have already pointed out, Order No. 978 of September 1 left the discretion completely at large; No. 1681 of November 23, 1939, introduced descriptive words to guide the Home Secretary, but the courts held—solely on the question of interpretation—that the language of the amended 18B still conferred an absolute discretion, leaving no issue for trial in the courts. I myself, among other members of the Court of Appeal, delivered a judgment to that effect; and the House of Lords by a majority, Lord Atkin dissenting, held that that view was right: see *Liversidge* v. *Anderson* (1); *Greene* v. *Secretary of State for Home Affairs* (2). Lord Atkin on that question of interpretation expressed a different view solely because he could not persuade himself that the language of 18B was really clear enough to confer so startlingly wide a discretion on the executive as was thought in both cases by the Court of Appeal and by the other noble Lords party to the decisions of the House in the two appeals. Lord Atkin's opinion, though dissentient, is of great value, because it contains a considered analysis of our law on the very topics which I think give to the present appeal such cardinal importance. It is not necessary to quote it, but I refer to [1942] A. C., pp. 228 to 232, where his Lordship dealt with the power of arrest and the phrase "reasonable

(1) [1942] A. C. 206.
(2) Ibid. 284.

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" and probable cause." The authoritative value of that part of his judgment, though obiter, was not affected by the view of the majority upon which the decision turned, and is directly in point in the present case.

It is of vital importance to the whole nation that the right of arrest without warrant should always be closely watched by the courts whenever a case bearing upon it comes before them. Subject only to the sovereignty of Parliament, which under our constitution can make any law, English liberty is absolutely dependent on our courts of justice. To keep clear the distinction between the functions of the executive and those of justice is vital. The English nation has been wont in the past to speak of autocracy in any form as the enemy of personal freedom, but it is equally true that the good working of democracy (in the true sense of that much abused word) depends upon the rule of law. That is the essential theme of the fifth chapter of Dicey's " Law of the Constitution " ; of Anson's " Law and Custom " of the Constitution " (4th ed., by Berriedale Keith), ch. VI., s. 3, p. 295, and of C. K. Allen's " Law and Orders " just published. That is why this appeal is of such importance. Arrest by the executive, uncontrolled by the courts, has happened in past times in English history, and it needed the intervention of the courts to curb the executive : *Wilkes* v. *Wood* (1), *Leach* v. *Money* (2), and *Entick* v. *Carrington* (3). The lettres de cachet of eighteenth century France afford another illustration ; the Gestapo in Germany in recent years affords a third ; and finally it is the fear of a repetition of that vast, insidious, and progressive evil of encroachment by the executive on the proper sphere of the judiciary which is paramount in men's minds when they say they fear and therefore hate bureaucracy.

One of the most serious aspects of the facts is that Christie in cross-examination made grave admissions : that he knew when he arrested the plaintiff he had no power to do so as he had read the section of the Liverpool Act : that he arrested him and then kept him in detention and asked a remand in custody, all because he used that charge purely as a matter of convenience, pending further inquiries as to whether the charge of stealing could be put forward. I regard his admissions as involving a grave stain on the reputation of the Liverpool police force, and I am unable to agree with the learned judge's view that they behaved properly. I venture to refer to what I said in the case of *Dumbell* v. *Roberts* (1). Here there was not the faintest risk of the plaintiff running away; if on the morning of August 31 they entertained any substantial suspicion of the plaintiff being a thief, and wanted to give him a chance of clearing himself, they ought to have told him frankly that they suspected him of having stolen the bale. Instead, they frightened him about "unlawful possession" which obviously meant a rationing offence, particularly if he was, as I think probable, guilty of it. The plaintiff's evidence was never cross-examined to and never contradicted by Morris, who alone was present when he made that frightening statement to the plaintiff. This is what the plaintiff swore that Morris said: "(Q.) And the other officer Morris? (A.) I had complaints "about the questions he put to me at the time and his response "to them. (Q.) You mean about his manner? (A.) Yes. "(Q.) What was wrong with his manner? (A.) When I "replied he pooh-poohed everything I said. He said 'Don't "'think we have just dropped on you just like a bolt from the "'blue. We have made a good many inquiries before we "'have come. We know you have done this sort of thing "'many times before, and you must not think we are flat-"'footed policemen who have just dropped in on you like that.' "At the same time he repeatedly pointed out that it was not his "case but Christie's case. He said that he was only in it "because he was attached to the police station in the district "in which my warehouse was situated, and that it would be best "for me to tell the whole truth about the transaction, and that "is what I did." That was after Christie had left the office to interview the women in the warehouse. Nothing appeared in the course of the trial to warrant any such language. The learned judge heard the witnesses and I therefore abstain from criticizing in detail the views he formed of their answers, beyond saying that I feel he must have been much influenced by his opinion that the Liverpool police had made no mistake in law and were acting with propriety.

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(1) (1763) 19 St. Tr. 1153.
(2) (1765) Ibid. 1001.
(3) (1765) Ibid. 1030.

Apart altogether from the failure of the evidence in the case to substantiate any conceivable plea of justification there are two fatal defects of pleading in the defence. The first arises on the decision of the learned judge to overrule Mr. Laski's objection, and to allow an amendment intended to set up a plea of arrest on the common law footing of a reasonable suspicion of felony, namely, that the plaintiff had stolen the bale. As originally pleaded the defence contained no allegation of arrest under the common law power attaching to suspicion of felony. The only averment was of an arrest under the statute. There was no other arrest in fact and none was alleged. Even if an arrest for two offences had been put forward, it would have been bad for the same reason as a double statement in any document within s. 32 of the Criminal Justice Act, 1925, to which I have referred, would have been bad. It was therefore the duty of Stable J. to ignore the words "which he had stolen" at the end of para. 3 of the original defence as being "unnecessary " . . . . or which may tend to . . . . embarrass . . . . the fair " trial of the action" within Or. 19, r. 27, of the Rules of the Supreme Court. In truth they were words which should have been struck out. Under s. 507, sub-s. 5, of the Liverpool Act "stolen" is defined as meaning "stolen or unlawfully " acquired." Under it, therefore, it is enough for the prosecution in such a case to prove that at some time between the lawful possession of the true owner and the possession of the person charged with an offence under the section there has been a theft, or false pretences or other breach of the law, vitiating the latter's right of possession, committed by somebody; but the section does not call for his identification. The maximum penalties of 5*l*. or two months show that no serious offence is within its ambit. For these reasons it follows that the learned judge ought ex debito justitiæ to have allowed Mr. Laski's objection to the amendment.

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(1) (1944) 42 L. G. R. 111, 114.

There is another defect in the defendants' plea of justification, which would still be present even if the amendment had been properly allowed, and if, when allowed, the amended defence had contained a sufficient plea of justification on the common law ground of felony. The plaintiff was arrested soon after noon and then taken to Essex Street bridewell. Paragraph 3 discloses no justification of an arrest on the common law ground in those of the particulars attached to that paragraph which refer to what happened before arrest: they are relevant only to the statutory ground for arrest without warrant. Indeed there is no allegation in the particulars anywhere that the plaintiff was told of the suspicion of felony till the morning of September 1, prior to his appearance before the stipendiary. But every plea of justification to a claim, whether of libel or slander, or of wrongful dismissal or of trespass, must under Or. 19, r. 4, "contain . . . . a statement . . . . of the "material facts on which the party pleading relies for his ". . . . defence": see the cases cited, with quotations from the judgments, in the notes to that rule in the White Book. It is common, much too common, to put material facts into "particulars" under r. 6. The really material facts of justification should be stated in the defence itself pursuant to r. 4 and not relegated to so-called "particulars," which are often not settled with the same care as the pleading itself. Rule 6 I regard as appropriate rather, not to strictly "material" facts, essential to the cause of action or ground of defence, but to facts of which the opposing party ought to be made aware in order to prepare his evidence: see the statement by Lord Penzance in *Marriner* v. *Bishop of Bath and Wells* (1), and the observations by the editors of the White Book in their notes to r. 6 of Or. 19. The precedent of a defence in Bullen and Leake (3rd ed.) at pp. 795-6, bears out the view I have just expressed. Judged by this criterion there was never at any stage of the action an adequate plea of justification of the arrest at the plaintiff's premises on the basis of the common law defence of suspicion of felony. It follows that the many objections and protests by Mr. Laski throughout the examination-in-chief of the defendant Christie were well founded and that the learned judge ought to have allowed them. It is important for the trial judge to remember that the objecting counsel is often in the dilemma of choosing between seeming to be captious or even discourteous and failing to protect his client through not objecting when he ought.

I am loth to embark upon any critical analysis of the oral evidence in the case for several reasons. In the first place the whole of it was affected in greater or less degree by the erroneous view the trial judge took of the powers and duties of the police in the respects I have endeavoured to explain, and consequently of the issues he had to try. It made him, I think, more sceptical of the plaintiff's evidence and more favourable towards the evidence of Christie and Morris than I think was just: see, for instance the cross-examination of the plaintiff. Mr. Nelson, for the defendants, admitted that the police never on the morning of August 31 suggested that the plaintiff had stolen the bale; but the learned judge had the common law defence in his mind all the time and I think that he was under the erroneous impression that all through the 31st the plaintiff realized from the start that the real charge was larceny and

(1) Dec. 2, 1876, In The Arches Court of Canterbury, reported [1893] P. 145.

not a misdemeanor about coupons. In Christie's evidence in chief, and in cross-examination, there are many illustrations of this comment of mine, some of them quite startling. None the less I hesitate to discuss in any detail how far his misconception of the law affected his inferences, because he had, of course, the advantage over this court of seeing and hearing the witnesses. Further, the big issue in the appeal does not depend for its solution on any nice appreciation of the details of the evidence.

I have already criticized the action of Sergeant Tindall when at 5.45 p.m., on August 31 he took the charge and failed to order the plaintiff's release. But the fundamental misconception of the legal position in the minds of the Liverpool police had further evil results. The conduct of Sergeant Dalzell, who conducted the proceedings on the morning of September 1 before the stipendiary, is also open to criticism, for he accepted and acted on Christie's instructions to ask for a remand in custody. He, like Tindall, knew the terms of the Liverpool Act, and ought to have realized that they had no power whatsoever under it to arrest or detain the plaintiff, whose name and address were well-known to them. He said he did not understand the law, but as prosecutor it was his duty to know the law, and he owed a duty to the court to be careful not to mislead it, just as counsel would have owed such a duty. He knew that the reason the plaintiff had been brought to the court in custody was that he had been arrested on a charge under the Liverpool Act. He therefore knew that the plaintiff had been wrongfully arrested and ought to have told the stipendiary what the position was. I cannot but regard him as in that way responsible for the stipendiary's mistaken order for a remand in custody, and the learned judge appears, quite wrongly, to have exonerated him on the irrelevant ground that the plaintiff might have been arrested on the common law ground. The sooner this sort of delusion in the minds of the police about their powers is removed from their minds the better for the public and the rule of law in England.

Since writing this judgment I have read the judgment of my brother Lawrence. I was aware in a general way of the different view that he was taking and that is why I have felt bound to express my reasoning at such length. Had the court been of one mind on the gravity of the case, I should have been disposed to assess the damages on the evidence given, and my figure would have been one calculated to deter similar action by the police in future: but in the circumstances I think we should limit our order to allowing the appeal and directing an assessment of damages. But in the assessment there is one matter to be taken into account to which I have not yet referred. By an amendment of the statement of claim allowed at the trial the plaintiff alleged that without his consent photographs of him and finger prints were taken, and that this action constituted a trespass to his person. The defendants Christie and Morris were charged with responsibility for it on the footing that it was to their knowledge the natural consequence of their wrongful arrest. In the sense that it might properly be taken into account by a jury in assessing damages I think the claim well founded; but that result would I think follow even if the plaintiff were held to have, in his de facto position of a prisoner, consented to the operation; as if he did not consent the magistrate, if he was a prisoner under remand, could have ordered him to submit. On the facts of the case I regard the question of the legal rights of the police to do what they did as academic, for the real question is what is a fair award of damages to give the plaintiff for the whole of the indignities which his false imprisonment inflicted on him. But I feel bound to add that if an accused person ought to be on bail, as was the plaintiff's case, because he ought never to have been arrested, it is in my opinion very wrong to treat him as if he were a prisoner arrested on a justifiable suspicion of felony. I realize the need of the police to know the antecedents of a prisoner when convicted in order to answer the inquiries of the court about him before sentence, but that need is not a justification for treating a person wrongly arrested in the same way.

In regard to the terms of the order of the court there are one or two points to bear in mind. The last two defendants having been dismissed from the action before trial, the order will only concern the first four defendants. The statement made below and before us that the corporation of Liverpool accept all responsibility for all damages and costs payable by members of the Liverpool police force makes it unnecessary to distinguish between individual defendants, who are liable in damages; but no case was made before us against Balmer, who apparently had no responsibility for the wrongful detention of the plaintiff on September 15. Nor was any case against Tindall really argued before us: therefore, although I have drawn attention to his conditional duty, I have not formed any final opinion as to his liability. In my view, the damages should be assessed by a jury, directed to have in mind the principles expressed in this judgment.

LAWRENCE L.J. This appeal raises three questions: (1.) Whether Stable J. was right in believing the defendant officers when they swore that when they arrested the plaintiff without a warrant they suspected that he was guilty of felony; (2.) Whether they had reasonable grounds for such suspicion, and (3.) Whether the fact that they arrested and charged the plaintiff with unlawful possession of the goods in question prevented or estopped them from justifying the arrest on the ground that they in fact suspected the plaintiff of felony and that there were reasonable grounds for so doing. Stable J. in a careful and elaborate judgment held that there were reasonable grounds for the defendants' suspicions and found as a fact that the defendants bona fide entertained those suspicions. In my opinion the learned judge's judgment ought to be affirmed on both these points. Stable J. states the facts of the case in his judgment and no criticism of that statement was made to us, except as to the time of the first police telephone message, which the learned judge gave as 2 p.m. when it should have been 1.35 p.m., and of the credit which he attached to the witnesses. Wherever there was a conflict of evidence, or wherever it was essential to say whether he believed certain evidence, the learned judge stated his finding clearly. In certain matters he accepted the evidence of the plaintiff, e.g., that it was a casual inaccuracy on the plaintiff's part that the bale of cloth was consigned as waste. For my own part I do not think I should have come to that conclusion, but as I did not hear the plaintiff give his evidence it appears to me clear that I cannot disagree with the learned judge's view. In other matters he accepted the evidence of the police, though not on all occasions, for he did not accept the evidence of Sergeant Dalzell. In my opinion it is impossible for this court, without seeing the witnesses, to disagree with the judge's findings on credibility. Apart, however, from the view the judge took of the credibility of the witnesses, their evidence as to their state of mind at the time of arrest appears to me to be strongly supported by the contemporary documents which were in evidence. Immediately after arrest, namely, at 1.35 p.m., the defendant, detective constable Christie, telephoned to the Leicester police saying: "We would like you to interview Michaelson as we believe that "this cloth has been stolen in your district. Leachinsky has no "receipts or invoice, but Messrs. Blands, Ltd.'s, delivery note is "for 27 bales of 'waste'." It appears to me impossible to suppose that this statement of detective constable Christie's belief was concocted, as he was not at that time charging the plaintiff with felony. A great deal of cross-examination and some argument before us were directed to the question whether a bona fide suspicion can be entertained of alternatives and it was argued that if the police suspected, among other offences, black market offences, they could not at the same time suspect a felony. This argument, in my opinion, is fallacious. Suspicion necessarily contemplates alternatives. If you only suspect guilt you must contemplate the possibility of innocence and it appears to me that you may suspect two or more different crimes on reasonable grounds. The fact that indictments for larceny almost invariably contain counts for receiving appears to me to show this. I proceed therefore on the basis that the police bona fide suspected the plaintiff of felony at the time of his first arrest. It was not suggested that they did not at the time of the second arrest.

On the second question I am of opinion that they had reasonable grounds for such suspicion. They knew that he had consigned the goods under a false description; they had seen him handle the one bale of cloth and place it apart from the other bales: when told that they had reason to believe he had received a bale of cloth he said he knew nothing about it; when they examined the bale in his presence and found it contained a large amount of cloth, and he was asked for an explanation, he said he had bought it as rags: when asked where he got it he refused to say; when asked if he had any receipt or invoice he said he had not, and did not mention the cards referred to in the evidence or his purchase book. On the third question I am of opinion that Stable J. was wrong in distinguishing this case from *Dumbell* v. *Roberts* (1), and I consider this court is bound by that decision to hold that the appellant was entitled to succeed in this action. I agree with Stable J., however, in thinking that the decision in *Dumbell* v. *Roberts* (1) may place the police in a position of great difficulty. As my brethren have gone fully into their reasons for agreeing with the decision in that case, I think I ought to state the reasons why I respectfully differ from them. The case of *Walters* v. *W. H. Smith & Son* (2), does not appear to me to be the same in point of reasoning, for it was the case of a private person,

(1) 42 L. G. R. 111.

(2) [1914] 1 K. B. 595.

and there is no doubt that a private person who arrests without warrant must show that the felony for which he made the arrest has been committed. In such a case it would obviously be irrelevant to show that some other felony had been committed. But in the case of a police officer it is unnecessary for him to prove that any felony has been committed, and unless he is bound to state to the person arrested at the time of arrest the felony on which he arrests the question cannot arise whether his suspicions were of the felony stated on arrest.

The decision in *Dumbell* v. *Roberts* (1) appears to me to involve that a policeman who decides to arrest on suspicion of a felony must tell the person arrested at the time of arrest of what felony he suspects him. There is nothing in the authorities which suggests that a constable's right to arrest without warrant depends on what the constable says to the person arrested at the time of arrest. The constable's right is said to depend on the state of his mind. Constables are not lawyers and cannot possibly tell what charge will ultimately be brought against the person arrested. *Reg.* v. *Hughes* (2) and the cases there cited show that the legality of the charge does not depend on the legality of the arrest, and the Indictable Offences Act, 1848, ss. 8, 9 and 10, provide that no objection shall be taken to any information, complaint, summons or warrant for defects in substance or form or for any variance between it and the evidence. Justices may commit for any indictable offence or offences of which there is in their opinion a probable presumption of the accused's guilt: s. 25 of the Indictable Offences Act, 1848. There is nothing to indicate that their power is dependent on the police having charged the accused with the same offences as those for which they commit or on the police having said anything to the accused upon arrest. Nor does the committal bind the prosecution to draw the indictment for the offence on which the accused was committed. It appears to me, therefore, that it is not essential that the party charged should be told the nature of the charge at the time of his arrest. If what the constable says at the time of arrest is not binding, in the sense that the person arrested can subsequently be charged with a different offence, or if the constable is not bound to say anything at all, it seems to me impossible to hold, as a matter of law, that an arrest is wrongful

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(1) 42 L. G. R. 111.

(2) (1879) 4 Q. B. D. 614.

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because the constable gives a wrong reason for it though he might have given a right one. Let me take the case of a police constable who suspects on reasonable grounds that AB has killed CD and that AB is about to escape. Is it to be said that he cannot arrest the killer until he has made up his mind whether he is arresting him for murder or for manslaughter? The man cannot be charged with both felonies and it may be a matter of the gravest doubt which he has committed. Or suppose a constable sees a man apparently trying to evade him, with a knife covered with blood in his hand—is the constable not to arrest because he does not know whether the man has committed murder, manslaughter or wounding with one or other felonious intent? Or, again, suppose the police officer arrests on suspicion of one felony; the officer at the police station enters on the charge sheet another, either because further evidence has come in or because he disagrees with the constable's view; the chief constable for similar reasons orders that a different charge shall be made and the magistrate, again taking a different view, commits upon another charge. Can it be that the police officer has made an unlawful arrest because the man is not charged before the court with the same felony as that of which the police officer suspected him?

The difficulty in the present case arises because on the facts found, which I think must be loyally accepted, the police, though suspecting on reasonable grounds a felony, thought it right to arrest on the express charge of a misdemeanor, on which they knew or ought to have known they had no right to arrest, because they knew the plaintiff's address. But if constables can arrest in a proper case without giving any reason to the person arrested it does not in my view make the arrest unlawful in a proper case that they make a charge which is erroneous and is not proceeded with. In my opinion no formal charge need be made by the constable at the time of arrest and when a formal charge is made either then or subsequently it can be varied at any stage of the trial subject to the discretion of the court, which will ensure that the person accused has a fair opportunity of answering the charge—see Indictments Act, 1915, s. 5. In my opinion the function of the executive is to bring the person arrested before the court for what they reasonably suspect him to have done, provided it is felonious; it is the function of the judiciary to decide whether he did it and whether it constituted a crime and what crime; it is not the function of the executive to decide on the exact legal nature of what the arrested person has done.

It is argued that it is unfair not to let the person arrested know what the charge against him is, and no doubt it is desirable that he should be informed as soon as possible of the facts which are said to constitute a crime on his part, and ultimately, when the indictment is framed, what the actual charge is. But the undoubted fact that the charge may be altered seems to me to show that the right to know the charge only comes into existence when the indictment is finally drawn. The object of the rule that constables may arrest without warrant on reasonable suspicion of a felony must be to prevent escape and to assist the police in their duty of detecting such serious crimes as felonies and it appears to me that the liberty of the subject and the public interest in the detection of crime are sufficiently protected by the necessity of the constable bona fide suspecting that the person he arrests has committed a felony and having reasonable grounds for that suspicion. It is in my view important to remember that crime is not a game played on both sides in accordance with rules and I am therefore reluctant to assent to rules which in my view may unduly hamper the police in what may be matters of life and death.

A further question is raised as to the second arrest on September 15 and, as I understand it, the plaintiff's contention is that detective constable Christie in ordering the police to detain the plaintiff, when the stipendiary ordered his discharge from the dock, falsely imprisoned him. At that instant of time Christie undoubtedly suspected the plaintiff of a felony on reasonable grounds and was none the less entitled to arrest him, because the prosecution was to take place in Leicester and the Leicester police were not there to perform the ministerial office of taking the plaintiff away. I think it was unlawful to arrest in court, as is suggested, but I agree with Stable J. that the difference between being arrested in court and outside court is unsubstantial. For these reasons, though I respectfully disagree with the principles which I conceive to have been laid down in *Dumbell* v. *Roberts* (1), and by my brethren in this case, I agree that this appeal must be allowed.

UTHWATT J. I agree with the judgment of Scott L.J. I propose for the purpose of arriving at a conclusion on the legality of the arrest made on August 31, 1942, to make the assumption that Stable J. was right in finding that Christie, at the time he made the arrest, suspected, on reasonable grounds, that Leachinsky had committed a felony. But it is clear beyond doubt that Christie arrested Leachinsky with a view not to the prosecution of Leachinsky for that felony, but with a view to the prosecution of Leachinsky for the offence of unlawful possession, an offence which is not a felony and for which, in the circumstances which obtained, there was no statutory power of arrest without warrant. The question of law that then arises is whether Christie can, in in action for false imprisonment based on that arrest and the ensuing detention, justify by reason of the suspicion he is assumed to have reasonably entertained. Under our system a person may be lawfully arrested under the authority of a warrant, or without a warrant either under express statutory provision or under the common law power of arrest. The common law power of arrest may be exercised as well by a private person as by a constable, and may be exercised either in respect of any felony or in respect of some misdemeanors. It is a condition of lawful arrest, where felony enters into the matter, that if a constable arrests there should be entertained by him a suspicion of felony based on reasonable grounds—the test is an objective one—and that if a private individual arrests, there should have been also a felony committed in fact. As regards misdemeanors the rule of the common law is entirely different. Persons guilty or suspected of misdemeanor cannot be arrested at common law except in cases of an affray or violence to an individual, and then only where the person arrested is taken in the act or immediately after its commission. The point of the rules of law as to arrest for misdemeanor is obviously that the arrest is to be made only in order to preserve the peace. There is, therefore, for the purpose of arrest, a marked distinction in the common law between felonies and misdemeanors. But both in the case of misdemeanor and felony, the act to be justified is an arrest. Arrest is a step in criminal procedure directed to leading to an adjudication in due course of law on the conduct in the matter in hand of the person arrested. For it is the duty of a constable arresting without warrant with all due speed to bring the individual arrested before a court of justice having jurisdiction in the matter, and it is the duty of the private citizen either to take that course or to hand the supposed offender over to a constable with a view to that course being taken. Neither can justify private detention. There is no lawful arrest therefore unless the interference with the individual's liberty is made as a preliminary step to an investigation by a court of justice. From these two considerations—first, the marked distinction between the circumstances justifying an arrest where felony is in question and the circumstances justifying an arrest where misdemeanor is in question and, second, the fact that arrest is a step in criminal proceedings—it appears to me logically to follow that a person cannot be lawfully arrested for a misdemeanor by a constable merely because the constable reasonably suspects him of having committed a felony. The facts which are necessary to justify the arrest of a suspected felon dictate the purpose for which alone that power to arrest may be used. The contrary conclusion involves acceptance of the proposition that there is a class of persons—suspected felons—who may be arrested without warrant for any offence. That proposition is untenable. No authority supporting the defendants' contention was cited and my own researches have failed to find any that support it. The authorities point the other way. In Hawkins' Pleas of the Crown (8th ed.), bk. ii., ch. xii., p. 120, the matter is put this way : " As to the fourth particular, " namely, in what manner an arrest for such suspicion is to be " justified in pleading. Section 18. It seems to be certain, " that . . . . regularly he ought expressly to show, that the " very same crime for which he made the arrest, was actually " committed." I quote this on account of the phrase " the very " same crime." *Walters* v. *Smith* (1), is I think in point. In that case the plaintiff in an action for false imprisonment had been arrested by the defendants, private individuals, for stealing a particular book. That particular book had not been stolen. Other books had been stolen and the defendants had reasonable grounds for thinking that the plaintiff had stolen them. Much of the old law is there referred to and I do not propose to cover the same ground. It was held that the plaintiff was entitled to recover. There was not identity between the crime for which the arrest was made and the crime entering into the circumstances supposed to justify the arrest.

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(1) 42 L. G. R. 111.

The old form of pleading as shown in the books of precedents supports the plaintiff's contention. The plea of justification in an action for false imprisonment traces the case from the moment of the supposed offender's apprehension for a stated offence to the proceedings before a magistrate having

(1) [1914] 1 K. B. 595.

jurisdiction "in order that [the offender] might be dealt with "according to law in respect of the premises"—Bullen and Leake, (3rd ed.), p. 797) or "to answer the premises"—Chitty on Pleading (7th ed.), vol. III., p. 328, et seq. In my opinion there was on the facts no defence in law to this claim for false imprisonment and for that false imprisonment Christie and Morris are liable.

I would add that the matter of an unlawful arrest is not likely to be the subject of detailed consideration when the arrested person is brought before a magistrate. An individual who is before a court of justice under an arrest may be charged—I speak generally—with any offence which that court has jurisdiction to entertain. The jurisdiction of the court to try the offence with which he is then charged is not affected by the fact that the arrest was illegal (see *Turner* v. *Postmaster-General* (1). *Reg.* v. *Hughes* (2)). The jurisdiction to take cognizance of the offence is one thing: the fact that the accused's presence has been unlawfully secured is another thing. At most the accused's right before that court, where the arrest is unlawful, is to demand release from the illegal arrest and to ask for an adjournment to enable him to prepare his case in respect of the charge then made.

As regards Christie's action on September 15, 1942, in securing that Leachinsky was not discharged as ordered by the magistrate—an action which involved interference with Leachinsky's freedom—I am of the opinion that there was a clear case of false imprisonment by Christie. Leachinsky was entitled to be freed and Christie secured that he should not be freed. Whether an arrest in the face of the court can ever be justified is open to question—see Comyn's Digest, tit. Imprisonment, H. 5, but it is not necessary to enter into that question. The interference with the due operation of the order for discharge is to my mind sufficient. No doubt Christie, once Leachinsky had been in fact discharged, could, in aid of the Leicester police force with a view to Leachinsky's prosecution for felony, have forthwith lawfully arrested him, but that is exactly what he did not do. I agree therefore with Stable J. that there was a false imprisonment—and indeed at the close of the hearing before us this was admitted—but I disagree with the view taken by Stable J. that the matter can be dismissed on the footing that it is de minimis. In the matter of a trespass

(1) (1864) 5 B. & S. 756.

(2) 4 Q. B. D. 614.

to the person a petty impertinence is not beneath the notice of the law, just as dignified insolence is not above it. The assumption and exercise of authority over the disposition of Leachinsky's person in defiance of the magistrate's order under colour of Christie's position as a police officer does not fall within the rule de minimis. Leachinsky was entitled to be dealt with according to law and it was not for Christie, for reasons of convenience, to supersede the law.

There are some observations on the facts of this particular case which I desire to add. First: Leachinsky has little cause to be persuaded of the efficiency and fairness of the Liverpool police. The judge below accepted Christie as a truthful witness and I am content to accept the judge's view. On that basis, I fail to see that Christie had reasonable grounds for suspecting that Leachinsky had been guilty of any felony and Christie's own answers in cross-examination indeed seem to me to rule out the existence of reasonable grounds. I find it difficult to reconcile Christie's detailed statement that he could not decide between theft, receiving, unlawful possession and dealing in the black market without coupons—for all of which, according to him, he had reasonable grounds of suspicion—with the existence in fact of suspicion of felony on reasonable grounds. Suspecting a felony or something which is not a felony was not in the particular circumstances suspecting a felony on reasonable grounds. His immediate choice of a prosecution for something not a felony hardly helps the view that a felony was suspected on reasonable grounds, any more than the fact that it was only by amendment of the pleadings, made at the trial, that it was alleged that suspicion of felony was entertained. Sergeant Tindall, who had a power to release on bail in a case such as the present under s. 38 of the Summary Jurisdiction Act, 1879, did not profess to consider the propriety of exercising the power vested in him. He had instructions that the detective in charge of the case was the officer to decide whether bail should be given or not. The anonymous giver of these instructions might well employ his time in considering the purpose for which the power is given, and the person to whom it is given, and reflect on the impropriety of giving any direction and the fatuity of the direction given in light of the purpose the power is designed to serve. That purpose is not the automatic recording of the wish of the arresting officer or his superior, but the due and fair administration of the criminal code. It is of a piece with the proceedings of the day before that the

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police opposed bail at the hearing of September 1; that on the occasion of one of the applications to the magistrate for bail the police opposed bail on the ground, inter alia, that there was no jurisdiction to grant it (no one was able to tell the court the foundation for such a contention), that at the hearing on September 15, Michaelson was not in court, though apparently at the previous hearing his attendance had been asked for pursuant to s. 507, sub-s. 2, of the Liverpool Act; and that following on the order "Case withdrawn—prisoner discharged" the case at Liverpool ended, as it began, with Christie's unlawful domination over the plaintiff's person. Second: As regards the other parties concerned, the learned judge stated "Mr. Leachinsky leaves this court without the slightest "fragment or vestige of suspicion attaching to his name"; and "The police with whom I am concerned here, and the "others, in my judgment discharged their difficult and indeed "delicate duty honestly, reasonably and within the limits which "the law permits." I do not agree. As regards the police officers, I cannot see that their duty was difficult or delicate. I do not question their honesty. Some of the Liverpool officers did not keep within the limits of the law, and in many of their actions there was substituted for the working of reason a mechanical exercise of power. So far as Leachinsky is concerned the judge, rightly or wrongly, disbelieved much of his evidence and thought him guilty of some offence relating to coupons. But Leachinsky's breaches of the cloth rationing regulations do not affect his right to personal liberty. The transgressor of the law, while disobeying it, can still rely on the law and assert the law's supremacy.

Appeal allowed.

Solicitors for plaintiff: *J. H. Milner & Son for Silverman & Livermore, Liverpool.*

Solicitors for defendants: *Cree & Son for W. H. Baines, town clerk, Liverpool.*

W. L. L. B.

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C. C. A.

1945

Oct. 29.

Hilbery, Wrottesley and Stable JJ.

Criminal law—Transmission to court of trial of prisoner's statement before justices—Contents of statement—Finality of justices' certificate—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 12, *sub-s.* 4.

Justices—Refusal of justices to commit on some of charges—Committal on other charges—Addition to indictment of counts relating to former charges without previous leave of judge—Tribunal to decide if counts founded on facts disclosed before justices—Administration of Justice (*Miscellaneous Provisions*) *Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 2, *sub-s.* 2 (*i.*).

When before the justices the appellant, a solicitor, in reply to the question addressed to him under s. 12, sub-s. 2 of the Criminal Justice Act, 1925, made a three hours' speech, arguing his case as an advocate. Part of this statement only was transmitted to the court of trial under sub-s. 4, but the part so transmitted had been duly read over to the appellant, and signed by the examining justices and also by the appellant himself :—

Held, that the provisions of s. 12 were not intended to apply where an accused person made an oration as an advocate in his own behalf, and that the statement as signed by the examining justices was final.

Counts containing charges upon which the justices had refused to commit the appellant were inserted in the indictment under s. 2, sub-s. 2 (i.) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. No previous application to the court for permission to insert them had been made :—

Held, that no previous application to the court was necessary, that objection, if any, to such counts must be by motion to quash before the trial judge ; and that it was for the trial judge then to decide whether the counts were founded on facts or evidence disclosed in the depositions taken by the justices in the presence of the person charged.

APPEAL against conviction.

The appellant, William Ritson Morry, was convicted at Birmingham Assizes on July 26, 1945, on an indictment containing four counts charging him with the fraudulent conversion of four sums of money aggregating 3,136*l.*, and was sentenced to eighteen months imprisonment. He appealed against his conviction on two grounds. The first ground was that the appellant's statement before the justices made in response to the question addressed to him in accordance with s. 12, sub-s. 2, of the Criminal Justice Act, 1925. " Do you wish to say " anything in answer to the charge ? You are not obliged to " say anything unless you desire to do so, but whatever you

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" say will be taken down in writing and may be given in " evidence upon your trial," had not been transmitted in full to the court of trial in accordance with s. 12, sub-s. 4, of the Act, and that, therefore his committal was irregular. In response to the above question the appellant had made a speech of some three hours' duration, defending himself as an advocate. The transmitted statement contained parts of that speech only, but had been read over to the appellant and signed by him as well as by the committing justices. On the above objection being raised at the court of trial, the trial judge held that the justices' certificate signed by them was final as to the contents of the statement, and he overruled the objection.

The second ground of appeal was that the first two counts of the indictment, dealing with charges upon which the justices had refused to commit, and purporting to be inserted by virtue of s. 2 sub-s. 2 (i.) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (1) had been inserted without the leave of the court having been previously applied for and obtained. The trial judge himself took the point as to their validity, and decided that no previous application was necessary, and that it was for him to decide (as he did) that the counts were founded on facts disclosed in the depositions,and were properly inserted.

The appellant was convicted on all four counts, and he now appealed.

The appellant in person. Section 12, sub-s. 4, of the Criminal Justice Act, 1925, enacts " Whatever the accused states in " answer to the charge shall be taken down . . . . and shall " be transmitted to the court of trial." In fact only part of

(1) Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36), s. 2, sub-s. 2 : " Subject as hereinafter " provided no bill of indictment " charging any person with an " indictable offence shall be pre- " ferred unless either (*a*) the person " charged has been committed for " trial for the offence ; or (*b*) the " bill is preferred by the direction " or with the consent of a judge of " the High Court or pursuant to an " order made under s. 9 of the " Perjury Act, 1911 : Provided " that (i.) where the person " charged has been committed for " trial, the bill of indictment " against him may include, either " in substitution for or in addition " to counts charging the offence " for which he was committed, " any counts founded on facts or " evidence disclosed in any ex- " amination or deposition taken " before a justice in his presence, " being counts which may lawfully " be joined in the same indict- " ment."

what the accused stated was transmitted. This was an irregularity, and consequently the committal was bad and no bill of indictment could be preferred: *Rex* v. *Gee* (1). See also *Rex* v. *Phillips* (2). With regard to the second ground, counts dealing with charges on which the justices have not committed can only be inserted under proviso (i.) to s. 2, sub-s. 2, of the Administration of Justice (Miscellaneous Provisions) Act, 1933, on application to the trial judge and with his permission. No such application was made in this case, and the prosecution, by inserting them without leave, really overruled the justices. [*Rex* v. *Coyne* (3) was referred to.]

Sandlands K.C. and *A. P. Marshall* for the Crown were not called upon to argue.

The judgment of the court was delivered by

HILBERY J., who stated the facts and continued: With regard to the first ground of appeal, we are of opinion that the trial judge was right. Section 12 of the Criminal Justice Act, 1925, enacted a code of procedure which must be followed. It was conceded that the justices had taken all the procedural steps required of them by the section, and it was only contended that the appellant's statement before them, signed in accordance with the section, did not contain all that the appellant had actually said. That does not go to establish a failure on the part of the justices to comply with the section, as was the case in *Rex* v. *Gee* (1), and in *Rex* v. *Phillips* (2). It goes to establish that the matter the justices have certified as a correct account of what was stated is not, in fact, a correct account. But the matter does not rest there. The appellant was addressed by the justices in accordance with the procedure laid down by s. 12, sub-s. 2, of the Act of 1925. The appellant, a practising solicitor, knew the purpose of that question and to what extent the opportunity should be taken for making a statement, and he knew the sort of statement which was contemplated, but he took that opportunity to make a speech lasting some three hours. In our view the procedure under s. 12 was never intended to apply to a man making an oration as an advocate on his own behalf. That is not the time at which all the arguments should be put. The duty to see that what is transmitted to the court of trial correctly represents what has been stated by the accused is a duty laid on the

(1) [1936] 2 K. B. 442.
(2) [1939] 1 K. B. 63.
(3) (1905) 69 J. P. 151.

examining justices, and, as the trial judge held, their certificate is final as to the statement made. The appellant is not handicapped, for he can make any statement to the judge and jury at his trial. In this case the appellant actually signed each sheet of the material as his statement, so that a more unmeritorious objection can scarcely be conceived. The appeal on that ground fails.

The second ground of appeal raises a question on the construction of s. 2, sub-s. 2, of the Administration of Justice (Miscellaneous Provisions) Act, 1933. The justices had refused to commit on the charges which were the subject of counts one and two of this indictment. The result was that so far as these two counts were concerned, the indictment could not be said to have been preferred under and in accordance with s. 2, sub-s. 2 (*a*) or (*b*) of the Act of 1933. No application had been made to the judge for his consent to their inclusion, or for his direction that they should be included, nor had the appellant been committed on those counts. Therefore, unless properly preferred under s. 2, sub-s. 2, proviso (i.) the indictment was bad. The difficulty which the wording of the sub-section creates is that it does not state who is to decide whether the counts which are added are founded on facts or evidence disclosed in the depositions.

The Act of 1933 by s. 1, sub-s. 1, abolished grand juries, and the framers must have had in mind the Vexatious Indictments Act, 1859 (repealed by s. 10, sub-s. 3, and sch. III. to the Act of 1933), and the amending Act, the Criminal Law Amendment Act, 1867, and the practice which had obtained under those Acts. [His Lordship read s. 1 of the Act of 1867]. The Act of 1859 gave rise to certain inconveniences and in consequence the Criminal Law Amendment Act, 1867, was passed. Section 1 (since repealed by the Act of 1933) contained provisions as to adding counts similar to those in s. 2, sub-s. 2, proviso (i.) of the Act of 1933, except that they were to be founded " in the opinion of the court in or before which the " same bill of indictment be preferred " on evidence disclosed in any examinations or depositions. Under the Act of 1867 it was not necessary to obtain the opinion of the court before including such counts. They might be, and often were, objected to on a motion made to the trial judge to quash the indictment in so far as it contained those added counts. It was then for the judge to consider whether in his opinion they were founded on facts disclosed on the depositions.

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In s. 2, sub-s. 2, of the Act of 1933, which we are considering, the words of the Act of 1867 " in the opinion of the court in or " before which the same bill of indictment be preferred " are not to be found, but the section cannot have intended to put it in the power of the prosecution to decide finally whether the indictment should include charges on which the justices, the statutory court designated by law to inquire whether those charges are prima facie made out, have refused to commit. That would enable the prosecution to overrule the justices. The governing words at the beginning of s. 2, sub-s. 2, preclude such a view. Where then rests the power to decide whether such counts are properly included ? The answer is, plainly, with the court before which the bill of indictment is preferred. The question in its nature is one of legal objection to the indictment, and is appropriate matter for a motion to quash it. The omission of the words " in the opinion of the court in or before " which the same bill of indictment be preferred," coupled with the whole structure of the section and sub-section in question, leaves no room for supposing that the opinion of the court must be obtained before adding such counts, nor, be it noted, are there any rules providing machinery for such a course, while there are such rules for obtaining the preliminary leave of the court where such leave is a condition to such an indictment being preferred. This construction leaves the question whether an indictment is good or bad so far as such counts have been added, a matter of law for decision by the trial judge on motion made to quash the indictment as far as the added counts are concerned.

As in this case, in cases where the accused person is not represented, the trial judge, where there is any doubt as to the inclusion of such counts, will raise, consider and decide the question. The second ground of appeal also fails.

Appeal dismissed.

Solicitor for Crown : *Director of Public Prosecutions.*

W. L. L. B.

Considered. CARTER *v.* GREEN [1950] 2 K. B. 76

Applied. DUDLEY AND DISTRICT BENEFIT BLDG. SOC. *v.* EMERSON. [1949] 1 All E.R. 691.

Considered. EDGWARE ESTATES *v.* COBLENTZ. [1949] 2 K. B. 717

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Nov. 8, 9, 30.

Scott, du Parcq and Morton L.JJ.

NORMAN *v.* SIMPSON.

Landlord and tenant—Rent restriction—Sub-lease of premises in breach of covenant—Landlord's waiver of right of forfeiture—"Premises" . . . . have been lawfully sub-let"—Sub-tenant's rights on determination of tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 3.

Premises are "lawfully sub-let" within the meaning of sub-s. 3 of s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, if the head lessor has no subsisting right of re-entry, and they are unlawfully sub-let if he has such a right; and the words "have been lawfully sub-let" refer to the time at which the head-tenancy determines, so that the sub-tenant will be within the protection of the sub-section if at that time the landlord has no right of re-entry.

Where, therefore, a tenant, in breach of the terms of his tenancy, sub-let premises to which the Act applied without first obtaining the consent of the landlord who, however, continued to accept rent with knowledge of the breach and so waived his right to forfeit the lease, and the sub-tenant, on determination of the head-lease by due notice, accepted by the head-tenant, claimed the right to hold over as statutory tenant:—

Held (by Scott and Morton L.JJ.; du Parcq L.J., dissenting), that, there being no right of re-entry in the landlord at the time of the determination of the head-tenancy, the sub-tenant was entitled to the protection of sub-s. 3 of s. 15.

Per du Parcq L.J. In the absence of any written consent given by the landlord to the sub-tenancy after its inception, or of any agreement by him under seal or for valuable consideration to waive the lessee's breach, the sub-letting was and remained at all times unlawful, notwithstanding the landlord's waiver of his common-law right of forfeiture by accepting rent with knowledge of the breach.

APPEAL from Barnstaple county court.

In 1937, Miss Irwin, owner of the freehold of a house, falling within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Acts, called "The Lodge" at Berrynarbor, Devonshire, by an agreement in writing leased that house to one Conibear for three years from March 25, 1937, at a yearly rent of 68*l.*, the tenant agreeing not to sub-let the house without the written consent of the landlord. On the determination of that tenancy in March, 1940, the tenant continued in occupation, with the consent of the landlord, as tenant from year to year. Later in 1940, however, the tenant sub-let the house furnished to the defendant Simpson at eight guineas a week without obtaining the consent of the landlord. In September, 1940, the sub-tenancy was changed, the tenant

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

sub-letting it unfurnished to the same sub-tenant at 156*l*. a year. Again, the consent of the landlord was not obtained.

In the summer of 1941, the landlord's father, as her agent, visited the house two or three times in connexion with repairs which were carried out at the landlord's expense, and he saw the defendant in occupation and observed certain works of internal decoration which had just been carried out on the orders of the defendant and at the latter's expense. During one of those visits the defendant suggested to the landlord's father that he might rent the house direct from the landlord, whereupon the father suggested that the sub-tenant should buy the house. The question of purchase was subsequently discussed, but no agreement on a price was reached. The suggestion that the defendant should rent the house direct from the landlord was later repeated to the landlord herself, and the defendant relied on that conversation among other things as showing that the landlord was aware that a sub-tenancy at 156*l*. a year had been granted to the defendant by the tenant. At all times until March 25, 1945, the landlord accepted from the tenant the rent of 68*l*. a year payable under the tenancy agreement, and she at no time made any objection, to either tenant or defendant, to the granting of the sub-tenancy without her consent.

On June 12, 1944, the landlord gave the tenant notice to quit the house on March 25, 1945, which was accepted, and in December, 1944, she conveyed the freehold to the plaintiff, Norman. The defendant paid his rent of 156*l*. a year to the tenant up to January 31, 1945, and tendered the rent falling due after that date.

The plaintiff having brought an action against the defendant for possession and mesne profits, the county court judge made an order in his favour. The defendant appealed.

R. L. Edwards, for the defendant. It is submitted, first, that the test for determining whether the premises have been lawfully sub-let, that is, whether there is a lawful sub-tenancy for the purposes of s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), should be applied immediately before the tenant's interest determines. It is next submitted that the landlord can, by his conduct between the date of the tenant's breach of covenant by sub-letting without the landlord's consent and the date when the tenant's interest determines in the ordinary way, either preclude himself from contending that the sub-tenancy was invalid, or make the sub-tenancy actually valid, or do both, so that the premises are lawfully sub-let by the time when the head tenancy determines.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, sub-s. 3: "Where the interest of a tenant "of a dwelling-house to which "this Act applies is determined ". . . . any sub-tenant to whom "the premises or any part thereof "have been lawfully sub-let shall ". . . . be deemed to become "the tenant of the landlord on the "same terms as he would have "held from the tenant if the "tenancy had continued."

In *Chapman* v. *Hughes* (1) it was assumed that waiver by the landlord of a breach of covenant by the head tenant would prevent the landlord from recovering against the sub-tenant. Further, *Atkin* v. *Rose* (2) shows that acceptance of rent with knowledge of the breach of covenant by the tenant constitutes waiver.

[du Parcq L.J. Yes, but waiver of what ? It is clear that a landlord who accepts rent with knowledge of a breach giving a right to forfeit the lease is regarded as treating the lease as still subsisting. The breach of contract, however, remains, and the landlord remains entitled to sue for damages in respect of it : see Halsbury's Laws of England (2nd edn.), vol. xx, p. 353, para. 424. His continued acceptance of rent merely follows as of course from his decision to treat the lease as subsisting ; but it does not operate as waiver of the breach.]

[Scott L.J. The question seems to be whether, the head tenant continuing to be liable for damages for the breach, the sub-tenant may yet not be a trespasser.]

[du Parcq L.J. The sub-tenant here has to do more than establish merely that he is not a trespasser. He has to show that he is entitled to the peculiar privileges conferred by the Rent Restriction Acts, including that of getting the premises for the standard rent, which is much less than he has been paying, on the basis that the premises are lawfully sub-let to him. He is claiming a very great privilege.]

It is submitted that the crucial question is whether, at the time when the head tenancy came to an end, there was a valid sub-tenancy in being. It is a question of fact whether the landlord's conduct has precluded him from denying the lawfulness of the sub-tenancy. [He referred to *Elphinstone* (*Lord*) v. *Monkland Iron & Coal Co., Ld.* (3).] In *Willmott* v. *Barber* (4),

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(1) (1923) 39 T. L. R. 260.
(2) [1923] 1 Ch. 522.
(3) (1886) 11 App. Cas. 332.
(4) (1880) 15 Ch. D. 96, 105.

Fry J., laid down general principles for determining whether there has been estoppel, and it is submitted that those principles are fulfilled in this case. They were applied in *Civil Service Musical Instrument Association* v. *Whiteman* (1). If the landlord is estopped from saying that the original sub-letting was unlawful, that is an end to the case, for the estoppel must relate to the position existing at the creation of the sub-tenancy. It cannot be related to later events. This sub-tenant has been induced, by his belief, caused by the landlord's conduct, that his sub-tenancy is lawful, to spend money on the premises, and he has also changed his position for the worse by the mere fact of having lived on at the house in the belief that his sub-tenancy was lawful: *Turner* v. *Collins* (2).

[du Parcq L.J., referred to *Griffin* v. *Tomkins* (3).]

Brundrit for the plaintiff. It is submitted that the words in s. 15, sub-s. 3, of the Act of 1920, " have been lawfully sub-" let " must refer to some time in the past, and that that time would be when the sub-tenancy was created.

[du Parcq L.J., referred to *Doe* v. *Watt* (4) with reference to the landlord's right to forfeit the lease on the tenant's committing a breach of covenant by sub-letting without consent.]

Woodfall on Landlord and Tenant (24th ed.), at pp. 544, 545, draws the distinction between waiver of breach and waiver of forfeiture. The waiver of forfeiture by the landlord here did not involve waiver of the breach, for which consideration, of which there was none, would have been necessary. [He referred to *Dobson* v. *Espie* (5).] The landlord cannot be said to have both approbated and reprobated the sub-tenancy simply because she allowed the lease to run its course despite the unlawful sub-tenancy. Not having suffered any actual damage through the sub-tenancy, she did not sue the tenant for damages, but that does not mean that her right of action did not exist; nor does it prevent her from declaring the sub-tenancy to be unlawful. She remained entitled to treat it as unlawful there and then or at any time in the future. The fact that the sub-tenant cannot be turned out on account of the head-tenant's breach merely makes the sub-tenancy safe vis à vis the landlord;

(1) (1899) 68 L. J. (Ch.) 484.
(2) (1871) L. R. 7 Ch. 329.
(3) (1880) 42 L. T. 359.
(4) (1828) 8 B. & C. 308.
(5) (1857) 2 H. & N. 79.

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it does not make it lawful. The landlord has no means of ejecting the sub-tenant. The tenant alone might have that right. "Lawfully" in s. 15, sub-s. 3, means lawfully vis à vis the landlord. The fact that the sub-tenancy is lawful vis à vis the head-tenant who granted it is irrelevant.

Cur. adv. vult.

November 30. The following judgments were read:

MORTON L.J. [reading the judgment of SCOTT L.J., and himself, stated the facts and continued :] The defendant's sub-tenancy could not, of course, survive the termination of the head tenancy, and his claim to remain in possession depends entirely on s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is not disputed that "The Lodge" is a dwelling-house to which that Act applies. It would appear that the legislature has in mind two classes of sub-tenants, namely, sub-tenants to whom the premises have been lawfully sub-let and sub-tenants to whom the premises have been unlawfully sub-let. It is not easy to see exactly what sub-tenants fall within the latter class, but we think that the most reasonable explanation of the sub-section is that premises are in a state of being "unlawfully sub-let" within the sub-section if the head lessor has a subsisting right of re-entry, and are in a state of being "lawfully sub-let" when the head lessor has no such right.

It is still necessary, however, to consider the effect of the words "have been." These words indicate that the county court judge, in considering this matter, has to look back into the past, and the question is how far back he must look. There are, in our opinion, two possible constructions of the four words "have been lawfully sub-let," on the footing that our view as to the meaning of the word "lawfully" is correct. Construction (*a*) is that those four words refer only to the original sub-letting, and that, if the original sub-letting was such as to give rise to a right of re-entry in the head lessor, the sub-tenant does not come within the sub-section. Construction (*b*) is that the sub-tenant is within the sub-section if the head lessor had no subsisting right of re-entry immediately before the head tenancy came to an end, and that the earlier history of the sub-tenancy is irrelevant. For our part, we accept construction (*b*) and reject construction (*a*). Section 15, sub-s. 3, has remained unamended throughout the subsequent Rent Restrictions Acts, and in our view construction (*b*) is not inconsistent with the words used, and is exactly in accordance with the general scheme and intention of the Act of 1920 and the subsequent Acts. The provisions in the Act of 1920 relating to recovery of possession by landlords are directed to prolonging, beyond the term of their contractual tenancy, the possession of persons lawfully in possession of houses coming within the scope of the Act. This particular sub-section contemplates a case where the head tenant of a house is unable or unwilling to resist his landlord's claim to possession, but where some other person is actually occupying the house, or part of it, and desires to remain in occupation. We should have thought that the relevant question, in considering whether that person's possession should be prolonged, is: What was that person's status immediately before the interest of the head tenant was determined? Was he, at that time, a sub-tenant lawfully in possession or was he not? The earlier history of his possession seems to us to be wholly unimportant. We are not inclined to construe the relevant words as relating only to the time at which the sub-letting began, if they will fairly bear some other construction.

It has been argued that construction (*a*) is more in accordance with the literal meaning of the words used. The words " have " been," it is said, point to the beginning of the sub-letting. We, think, however, that the words " have been " were used instead of the word " are " or " is " because the sub-section is dealing with cases in which the interest of the head tenant " is determined," and a sub-tenancy cannot live beyond the interest of the head tenant. It may well have been thought inappropriate to speak in the present tense of the premises being lawfully sub-let in these circumstances. In this connexion it is perhaps of some assistance to compare the words " have " been lawfully sub-let," in s. 5, sub-s. 5, of the Act of 1920 and in the sub-section now under consideration with the words " is lawfully sub-let " in the repealed s. 2, sub-s. 1, of the Act of 1923, and in s. 7, sub-s. 1, of the Act of 1923. Counsel for the defendant relied strongly on the words " in such " circumstances " in the last-mentioned sub-section, and contended that that sub-section supplies a statutory interpretation of the sub-section under consideration; but we think that this is putting the matter too high. We are content to say

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that the explanation which we have given of the use of the words " have been " gains some support from the other statutory provisions to which we have referred, and that the language of the sub-section now under consideration does not compel the court to adopt construction (*a*). This being so, we adopt construction (*b*) for the reasons which we have already stated.

Turning again to the facts of the case before this court, we are prepared to assume, in favour of the plaintiff, that the house was " unlawfully sub-let " to the defendant in 1940 in the sense that the sub-letting gave the landlord a right to re-enter. Even so, the sub-tenant is, in our judgment, protected by the section because the landlord accepted rent from the tenant with full knowledge of the sub-letting and the landlord's right to re-enter was thereafter gone. We have stated the facts very fully because counsel for the sub-tenant put forward certain further contentions based on the later conduct of the landlord. On the view, however, which we take of the construction of the sub-section, it is unnecessary to consider these further contentions. We would allow the appeal, and order that the plaintiff's claim be dismissed and that he pay the defendant's costs here and in the county court.

DU PARCQ L.J. The plaintiff alleged in his particulars of claim that the premises in question were wrongfully occupied by the sub-tenant as a trespasser. Unless the sub-tenant is protected by the Increase of Rent and Mortgage Interest (Restrictions) Acts, he is rightly described as a trespasser, because he claims to occupy the premises only as a sub-tenant, and the tenancy of his lessor has been duly determined. The only question in this case is whether the sub-tenant is protected by reason of s. 15, sub-s. 3, of the Act of 1920. Is the defendant a "sub-tenant " to whom the premises . . . . have been lawfully sub-let ? " It cannot be doubted that the sub-letting to him was in its inception unlawful. The tenant, who sub-let the premises, had agreed with the lessor " not to underlet the premises without the consent of the landlord in writing." He broke that agreement, and so sub-let the premises unlawfully. If, at some date after the granting of the sub-tenancy, the lessor had given a written consent to it, or if the lessor had agreed to waive his lessee's breach by an agreement made under seal or for good consideration, it may well be that the sub-letting would have been rendered " lawful " within the meaning of the sub-section. These things did not happen, and, in my opinion, the sub-letting was and remains unlawful.

It was contended for the defendant that the landlord, the plaintiff's predecessor in title, had so acted as to estop, or, as counsel for the defendant preferred to say, to " preclude," the plaintiff from denying that the sub-letting was lawful. I can find nothing in the evidence to support this contention. By the acceptance of rent the landlord acknowledged the continued existence of the tenancy and waived the common-law right of forfeiture which the lessee's breach of a condition in the tenancy agreement had, I think, given her; but she did not thereby acknowledge that the sub-letting was lawful. She has never, in my opinion, so acted as to deprive herself of the right to recover damages against the lessee for his breach of contract. Her waiver of forfeiture no doubt had the result of leaving the defendant in undisturbed possession. The lessee could not evict him since he could not derogate from his grant or rely on his own unlawful act. The lessor, having waived the forfeiture, could not evict the sub-tenant while he remained in occupation with the leave and licence of the lessee. While the lessee's interest continued, the sub-tenant might thus be said to be lawfully in occupation of the premises. When that interest was determined he became a trespasser, since he was unable truly to assert that the premises had been " lawfully sub-let " to him. There is in my opinion no evidence of any act or omission on the part of the landlord, the plaintiff's predecessor in title, which can be held, according to any principle of law or equity, to preclude the plaintiff from denying that the sub-letting to the defendant was lawful.

On these grounds, the plaintiff was in my opinion entitled to the order made in his favour by the county court judge, although I am unable to concur in the judge's reasons. I can find no evidence to support his conclusion that the landlord " licensed sub-letting," if by those words he means that she did anything which either was equivalent to giving a consent in writing or rendered a consent in writing unnecessary. I am not satisfied that the judge is right when he says that " what " happened afterwards " (that is, after the grant of the sub-lease) " cannot affect the position arrived at," if by that he means that it would not have been possible for the lessor and lessee to render the sub-letting lawful in the ways which I have indicated. Further, I respectfully dissent from the view which the judge appears to have entertained that no acts or

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omissions of the plaintiff's predecessor in title could affect the plaintiff's position. None the less I am of opinion that the judge came to the right conclusion, and I would dismiss the appeal.

Appeal allowed.

Solicitors for the defendant sub-tenant: *Brooks, Davidson & Bartley.*

Solicitors for the plaintiff: *Coode, Kingdon, Cotton & Ward, for Crosse, Wyatt, Vellacott & Willey, Barnstaple.*

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Jan. 13, 14, 29.
Birkett J.

MERLIHAN *v.* A. C. POPE, LIMITED, AND J. W. HIBBERT PAGNELLO (THIRD PARTY).

Limitation—Motor-car—Collision—Injury to passenger—Drivers of car joint tortfeasors—Judgment against owners and driver of one vehicle—Negligent act of other driver done in execution of public duty—Third-party proceedings—Contribution—Expiration of statutory period—Cause of action—Date of accruing—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6, *sub-s.* 1 (*c*)—*Limitation Act,* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21, *sub-s.* 1.

The plaintiff, while travelling as a passenger in a Canadian War Department motor truck, driven by a member of the Canadian forces, was on March 15, 1943, injured in a collision between the truck and a motor vehicle owned by the first defendants and driven by their servant, the second defendant. On May 17, 1944, the plaintiff commenced proceedings against the defendants, who on May 15, 1945, obtained an order joining the driver of the Canadian army truck as a third-party. On June 14, 1945, judgment was given against the defendants and 300*l.* damages awarded to the plaintiff. Birkett J. found that the drivers of both vehicles had been guilty of negligence contributing to the plaintiff's injury. In these circumstances the defendants claimed contribution towards the damages from the third-party under s. 6, sub-s. 1 (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935. The third-party contended that the claim to contribution was barred by s. 21, sub-s. 1 of the Limitation Act, 1939. The defendants, on the other hand, claimed that their cause of action against the third-party did not accrue until their own liability had been established by judgment of the court on June 14, 1945, and therefore was not barred by effluxion of time:—

Held, (1.) that on the true construction of s. 21, sub-s. 1, of the

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Limitation Act, 1939 (1), the cause of action against the third-party accrued on the date of the accident, (2.) That the words in the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 1 (*c*) (2), "who, if sued, would have been liable," were not capable of being interpreted to mean "who, if sued in time, "would have been liable." The defendants' claim to recover contribution from the third-party was therefore barred.

ACTION tried by Birkett J.

The plaintiff, William Leonard Merlihan, claimed damages for personal injuries which he sustained in a motor car accident caused or contributed to by the negligence of the first defendants, A. C. Pope, Ld., or of their servant and agent, the second defendant, J. W. Hibbert, in the driving or management of their Bedford motor van on the Bath Road near Bedfont on March 15, 1943, when it collided with a Canadian War Department motor truck, which was being driven by John Pagnello, a member of the Canadian Armed Forces, and on which the plaintiff was travelling as a passenger. The writ in the action against the defendants was issued on May 17, 1944. No claim was ever made by the plaintiff against Pagnello, but on May 15, 1945, the defendants obtained an order joining Pagnello as a third-party. On June 13 and 14 the action was tried by Birkett J., who gave judgment in favour of the plaintiff and awarded him 300*l*. damages against the defendants. The decision in respect of the third-party proceedings was postponed until June 29, to enable Pagnello, if he so desired, to give evidence on his own behalf on the question of his alleged negligence. Pagnello did not elect to give evidence.

(1) Limitation Act, 1939, s. 21, sub-s. 1: "No action shall be "brought against any person for "any act done in pursuance, or "execution, or intended execution "of any Act of Parliament, or of "any public duty or authority, "or in respect of any neglect or "default in the execution of any "such Act, duty or authority, "unless it is commenced before "the expiration of one year from "the date on which the cause of "action accrued."

(2) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 1: "Where "damage is suffered by any person "as a result of a tort—(*c*) any "tortfeasor liable in respect of "that damage may recover contribution from any other tortfeasor who is, or would if sued "have been, liable in respect of the "same damage, whether as a "joint tortfeasor or otherwise, "so, however, that no person shall "be entitled to recover contribution under this section "from any person entitled to be "indemnified by him in respect of "the liability in respect of which "the contribution is sought."

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Armstrong-Jones for the plaintiff.

Ryder Richardson and *R. L. Travers* for the defendants. The defendants are entitled by s. 6, sub-s. 1 (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, to recover contribution from the third-party. The collision occurred on March 15, 1943, and the action was commenced by the plaintiff on May 17, 1944. There was no cause of action as against the third-party until the action had been commenced and judgment had been given against the defendants. A cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed: see Halsbury's Laws of England, 2nd ed. vol. XX, p. 603, para. 757. Brett J. said in *Cooke* v. *Gill* (1): "'Cause of action' has been held from the earliest time to "mean every fact which is material to be proved to entitle "the plaintiff to succeed—every fact which the defendant "would have a right to traverse." Lord Esher M.R., in *Coburn* v. *College* (2) adhered to the definition of cause of action which he gave in *Read* v. *Brown* (3): "I there said "that it is 'every fact which it would be necessary for the "'plaintiff to prove, if traversed, in order to support his right "'to the judgment of the Court'." For the defendants to be entitled to recover contribution against the third party it is necessary for them to prove that the plaintiff has a right to recover damages against them, and it is only then that the defendants have a cause of action against the third-party. The third-party comes within the term "any other person" in s. 6, sub-s. 1, of the Law Reform (Married Women and Tortfeasors) Act, 1935, who would, if he had been sued, have been liable in respect of the same damage.

P. M. O'Connor for the third-party. The effective "cause "of action" for negligence against the third-party (if any) arose on the date of the accident, namely, March 15, 1943. After the expiration of one year from that date the right of the plaintiff to recover damages from a person for any negligent act or default done in execution of a public duty expired by reason of s. 21, sub-s. 1, of the Limitation Act, 1939. In *Reeves* v. *Butler* (4), Lindley J. said: "This expression 'cause "'of action,' has been repeatedly the subject of decision, and "it has been held particularly in *Hemp* v. *Garland* (5), decided

(1) (1873) L. R. 8 C. P. 106, 116.
(2) [1897] 1 Q. B. 702, 706, 707.
(3) (1888) 22 Q. B. D. 128, 131.
(4) [1891] 2 Q. B. 509, 511.
(5) (1843) 4 Q. B. 519.

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"in 1843, that the cause of action arises at the time when "the debt could first have been recovered by action. The "right to bring an action may arise on various events but it "has always been held that the statute runs from the earliest "time at which an action could be brought." It is not contested that Pagnello comes within the class of person protected by s. 21, sub-s. 1, of the Limitation Act. Any claim which might have existed against him lapsed, however, after March 15, 1944. It is inconceivable that the defendants have a greater right against the third-party than had the injured party. The claim for contribution must fail.

June 29. BIRKETT J., after stating the facts, and finding that the third-party Pagnello, equally with the defendants driver, was guilty of negligence contributing to the collision, continued: The important matter which was relied on by counsel for the third-party is rather a difficult question of procedure at law. In answer to the claim for contribution made by the defendants, the third-party argues that he is not liable by reason of s. 21 of the Limitation Act, 1939. It is conceded that Pagnello came within the wording of that section. The accident which gave rise to these proceedings took place on March 15, 1943. That may be said to be the date of the cause of action, certainly so far as the plaintiff, the passenger, was concerned, against Pagnello. The plaintiff did not sue, and never has sued, Pagnello. The writ in the action against the defendants, A. C. Pope, Ld. and Hibbert, their driver, was dated May 17, 1944. It is quite clear that the plaintiff at that date could not sue Pagnello, because of s. 21, the limit of twelve months having expired. The summons with regard to the third-party notice was taken out in March, 1945, and an order was made on May 15, both dates, obviously, beyond the twelve month period of limitation. The defendants' claim against the third-party is made under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 1, which, making a change in the law, decreed that: "Where damage is suffered by any person as a result of a "tort . . . . (*a*) judgment recovered against any tortfeasor "liable in respect of that damage shall not be a bar to an action "against any other person who would, if sued, have been "liable as a joint tortfeasor in respect of the same damage." Accordingly, in the ordinary course, not only could the plaintiff sue the defendants, but that would not have been a bar to an

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action against Pagnello in an ordinary case. Paragraph (*c*), which is the important part of the sub-section, provides: "any tortfeasor liable in respect of that damage"—for which the defendants were held liable on June 14, 1945—"may "recover contribution from any other tortfeasor who is, or "would if sued have been, liable in respect of the same "damage." The claim here is for contribution by Pagnello on the ground that he being the "other tortfeasor, who is or "would if sued have been liable in respect of the said damage," they can recover from him.

The point is a new one; it has never been determined, and no real guidance on it exists. On behalf of the third-party it is contended that he is not liable to the plaintiff because of the Limitation Act, 1939, and, that in order to make the words in para. (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, applicable to this case, the words "who "is, or if sued 'in time,' would have been liable" must be substituted. It is clear that Pagnello was not sued in time. His liability arises because of his negligence on March 15, 1943. That was the date on which he became a tortfeasor, and, so far as the plaintiff is concerned, the cause of action, as is not disputed, arose on that date. It was argued for the defendants, several cases being cited which do not call for discussion, that so far as concerns them, as against the third-party, the date of the accident, March 15, 1943, is irrelevant; and that while that may be the date of the cause of action as between the plaintiff and the third-party, the date of the cause of action as between the defendants and the third-party must be taken to have been June 14, 1945, because that was the first date on which they became liable, by the finding of the court against them, for the damage suffered by the plaintiff. They say, therefore, that the Limitation Act, 1939, has no application.

The conclusion to which I have come is that it is not competent for the defendants to claim contribution from the third-party. I so hold on the express ground that the third-party is protected by the Limitation Act, 1939, because the cause of action in fact, accrued on March 15, 1943. The Law Reform (Married Women and Tortfeasors) Act, 1935, certainly made a great change in the law and, apparently, this particular difficulty was not foreseen. In my opinion, it would not be a proper interpretation of s. 6, sub-s. 1 (*c*) to read it as if the material words were "who if sued *in time* would have been "liable."

There will be judgment for the third-party against the defendants with costs.

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Solicitors for the plaintiff : *L. Bingham & Co.*
Solicitors for the defendants : *Hewitt, Woollacott & Chown.*
Solicitors for the third-party : *Barlow, Lyde & Gilbert.*

H. G.

BRITISH IRON AND STEEL CORPORATION, LD. *v.* MALPERN.

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Lewis J.

Landlord and tenant—Lease for two years "and then quarterly"—Determination by three calendar months' notice expiring on any quarter day—Three calendar months notice given before expiration of two years period—Construction.

The plaintiffs let premises to the defendant for a term of two years from June 24, 1943, "and then quarterly subject to three "calendar months' notice on either side expiring on any quarter "day." On June 21, 1945, three days before the expiration of the two years period, a three calendar months' notice to quit, to expire on September 29, was given by the plaintiffs. It was contended that valid notice could not be given before the termination of the two years period, and that the earliest notice could not expire before December 25.

Held, that the lease was one for two years and then on a quarterly basis subject to the three calendar months' notice. Valid notice to quit on September 29, could therefore be given up to June 28, and, consequently, the notice given on June 21 was good.

Herron v. *Martin* (1911) 27 T. L. R. 431, followed.

Gardner v. *Ingram* (1889) 61 L. T. 729, and *Lancashire & Yorkshire Bank's Lease* [1914] 1 Ch. 522, distinguished.

ACTION tried by Lewis J.

On September 1, 1943, part of certain premises, at 7 Park Lane were leased by predecessors in title of the plaintiffs to the defendant, Maurice Liebling Malpern, "to hold the "same unto the lessee for the term of two years from June 24, "1943, and then quarterly subject to three calendar months' "notice on either side expiring on any quarter day," and the defendant duly entered into possession. On June 21, 1945, three days before the expiration of the term of two years, the plaintiffs, the assignees of the reversioners, served on the defendant the following notice "We hereby give you notice "to quit and deliver up to us on September 29, 1945 . . . .

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"possession of the premises at 7 Park Lane . . . . which "you hold of us as tenant." On July 19, 1945, the defendant's solicitors wrote to the plaintiffs "We would point out . . . . "that the notice is not in order as our client was a quarterly "tenant from June 24, and the earliest date on which notice "can be given is for December 25 next." The defendant continued and remained in possession after September 29, 1945. The plaintiffs therefore brought this action to recover possession of the premises and for mesne profits from September 29, 1945.

Horniman and *G. R. F. Morris* for the plaintiffs. Three calendar months' notice to quit expiring on September 29, was duly given. Therefore the notice was valid. *Herron* v. *Martin* (1) covers this case.

Safford for the defendants. Notice to quit to determine a term cannot be given before that term commences. On June 21 the fixed term of two years still subsisted and the quarterly term, which the notice to quit purported to terminate had not yet commenced. In *Lancashire & Yorkshire Bank's Lease* (2) such a notice was held invalid, Eve J. saying that the case was indistinguishable from *Gardner* v. *Ingram* (3) a decision of a Divisional Court (Lord Coleridge C.J. and Bowen L.J.). In *Herron* v. *Martin* (1) *Gardner* v. *Ingram* (3) was not cited.

Horniman in reply. Each case must be decided on the language used in the lease. In *Lancashire & Yorkshire Bank's Lease* (2) the notice was to be given "after the expiration" of the fixed term, and in *Gardner* v. *Ingram* (3) the provision was the same. In the present case the provision as to notice referred only to the term succeeding the fixed term, and the notice was not to be a quarterly notice but one of three calendar months, which, consequently could be given at any time up to June 28, being in fact given on June 21. The minimum tenancy was, therefore, two years and a quarter. *Herron* v. *Martin* (1) was affirmed by the Court of Appeal on May 17, 1911 (4).

[*Reeves* v. *Davies* (5), *In re Searle* (6) and Foa's Landlord and Tenant (6th ed.) 119, were also referred to.]

LEWIS J., having stated the facts and read the habenbum in the lease continued: It is said on behalf of the plaintiffs

(1) (1911) 27 T. L. R. 431.
(2) [1914] 1 Ch. 522.
(3) (1889) 61 L. T. 729.
(4) Unreported.
(5) [1921] 2 K. B. 486.
(6) [1912] 1 Ch. 610.

that this case is covered by *Herron* v. *Martin* (1), a case which was decided by Darling J., the head-note of which reads: "By an agreement a farm was let to the defendants for a period "of three years commencing on March 25, 1907, and so on "from year to year until the tenancy should be determined "by either party giving to the other one year's notice in "writing. On March 21, 1910, the plaintiffs gave the "defendant a notice to quit on March 25, 1911. *Held*, that "the notice so given was good." Unfortunately there is not a very full report of that case. Darling J., in *Herron* v. *Martin* (1), according to that report, gave no reasoned judgment, but after hearing Mr. Gutteridge for the plaintiffs and Mr. Forster for the defendants, said: "There seems to be no definite "authority, but I think you are right. There will be judgment "for possession, but leave to appeal": and *Gardner* v. *Ingram* (2), on which Mr. Safford relies, appears not to have been cited. That case, however, was, on May 17, 1911, heard by the Court of Appeal. Whether the Court of Appeal had the case of *Gardner* v. *Ingram* (2) before them, I do not know, but the Court affirmed the decision of Darling J. (see Foa's Landlord and Tenant (6th ed.) page 119).

What is said on the other side is that you cannot give a notice to quit until the "original term"—if I may use that expression—has expired. This term of two years expired on June 23, 1945, and before that time a notice was given, namely, on June 21, to terminate the agreement in September. The clause does not provide that one-quarter's notice should be given, but that three calendar months' notice should be given. Therefore, other things being equal, notice would be given on June 28, and Mr. Safford—in an argument for which I am extremely indebted to him—has contended that *Gardner* v. *Ingram* (2) is an authority which says that in these circumstances such a notice as was given in this case is wrong. *Gardner* v. *Ingram* (2) deals with a lease for five years and the head-note reads as follows: "By an agreement for a lease "for five years it was provided that the tenancy might be "determined 'after the expiration of the term of three years "'out of the term of five years' by six months' notice in "writing expiring at the corresponding quarter day at which "the tenancy commenced. The tenant entered into posses- "sion on September 29, 1885, and on March 23, 1888, gave "notice to the landlord in the following terms: 'Kindly

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(1) 27 T. L. R. 431.

(2) 61 L. T. 729.

" 'take notice that I intend to surrender to you the tenancy " 'of this house on or before September 29, 1888.' *Held,* " That the notice to quit was equivocal in its terms, and " therefore bad."

Pausing there a moment, the judgments given by Lord Coleridge C.J. and Bowen L.J. deal more particularly with the first point, namely, that the notice was equivocal, but Lord Coleridge C.J., with the agreement of Bowen L.J., who did not give any reasons, seems to have said that on the terms of that clause the agreement was for a term of four years certain. The clause is this " The tenancy may be determined " after the expiration of the term of three years out of the " term of five years hereinbefore mentioned by six calendar " months' notice in writing from either of the said parties " to the other of them, and such notice must expire at the " corresponding quarter day at which the tenancy commenced." The case having been argued, Lord Coleridge C.J. said in the course of his judgment : " Mr. Cross relied on the " case of *Thompson* v. *Maberly* (1) where Lord Ellenborough " stated that if premises are taken ' for twelve months certain, " ' and six months' notice to quit afterwards,' the tenancy may " be determined by a six months' notice to quit expiring at the " end of the first year. That case is not, however, quite " satisfactory, as it appears to have been decided on the " meaning of the word certain, and as Lord Campbell points " out in a note the decision was for the plaintiff on another " point, so that Lord Ellenborough's observation was obiter. " It is true that in the case of *Brown* v. *Symons and Another* (2) " in the Common Pleas, which was an apprenticeship case and " turned upon the words ' for twelve months certain,' *Thompson* " v. *Maberly* (1) was cited in the argument, and was not disapproved of." That is the reasoning by which the Lord Chief Justice came to the conclusion that the agreement was, in fact, for four years certain.

That case was followed by Eve J. in the *Lancashire and Yorkshire Bank's Lease* case (3) in which the head-note reads : " By a lease dated February 21, 1911, certain premises were " demised by the defendants to the plaintiffs for a term of " five years from March 25, 1911, at a yearly rent of 225*l.* " to be paid by equal quarterly payments on the usual quarter " days. The lease contained a proviso that ' after the expira-

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(1) (1811) 2 Camp. 573.

(2) (1860) 8 C. B. (N. S.) 208.

(3) [1914] 1 Ch. 522

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" ' tion of the first three years of the term hereby granted, " ' if the lessees shall desire to determine this lease, and shall " ' give to the lessors six calendar months' previous notice " ' in writing of such desire, such notice to determine on any " ' quarter day . . . . then and immediately on the expiration " ' of such notice this present demise shall cease and be void.' " On November 14, 1913, the plaintiffs gave notice in writing " to the defendants that it was their intention to quit and " deliver up possession of the premises on June 24, 1914. " On a summons taken out by the plaintiffs to determine " whether the notice was good: *Held*, that the case was " indistinguishable from *Gardner* v. *Ingram* (1) and the notice " in question was invalid. The earliest day on which the lease " could be terminated was September 29, 1914." Eve J. said (2): " If this question of construction were free from " authority, I am by no means certain that my decision would " take the form which, since there is authority upon the point, " I feel that it must take. I think, after a careful examination " of the proviso in the lease here, it is impossible to distinguish " this case from that of *Gardner* v. *Ingram* (1) upon which " Mr. Rutherford relies. I need not read the proviso over " again, but it comes, I think, to this, that the term thereby " created shall cease and determine if, after the expiration " of the first three years thereof, the lessees shall so wish, and " shall give to the lessors six calendar months' notice in " writing of that wish, and then, in their favour, there is added " this, that such a notice need not expire on the anniversary " of the day on which the tenancy commenced, but may expire " on any one of the usual quarter days. So read, the clause " in this lease is indistinguishable from the clause construed in " *Gardner* v. *Ingram* (1) by Lord Coleridge C.J. and Bowen " L.J." Then he deals with *Gardner* v. *Ingram* (1) and says at the end of his judgment: " For these reasons I come to " the conclusion that the contention of the landlords here " is right, and that, on the summons, I must hold that the " notice purporting to determine this tenancy on June 24, " 1914, is invalid, and that the earliest date on which the " lessees can determine the tenancy is September 29, 1914. " The costs must follow the result."

Those two cases are relied upon by counsel for the defendant and he says that the present case is on all fours with the latter case, and that I ought to follow it. I do not think this case

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(1) 61 L. T. 729.

(2) [1914] 1 Ch. 525.

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is distinguishable from *Herron* v. *Martin* (1), but I do think there is a distinction between the effect of the clause in this case and the clause in *Gardner* v. *Ingram* (2) and the clause in the *Lancashire and Yorkshire Bank's Lease* case (3). I think this clause means that : This lease is for two years, and after the expiration of two years the lessee may continue to occupy the premises on a quarterly basis, and if a quarter's notice is given to determine after the two years, then that is a good notice—assuming that the length of the notice is three calendar months after the expiration of the two years' term. Therefore, although the notice was given on June 21, and it was given in one sense, too early, it might have been given on June 28 to expire in September. That, I think, is the distinction between this case and *Gardner* v. *Ingram* (2) on which reliance is placed by the defendant.

This case is one of difficulty, but I must decide in favour of the plaintiffs, and, there must be an order for possession and mesne profits.

Solicitors for plaintiffs : *Allen & Overy.*
Solicitors for defendant : *Emanuel, Round & Nathan.*

(1) 27 T. L. R. 431.
(2) 61 L. T. 729.
(3) [1914] 1 Ch. 522.

W. L. L. B.

C. A.

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Dec. 4, 18.

MacKinnon, Tucker and Bucknill L.JJ.

REX *v.* JUSTICES OF THE APPEALS COMMITTEE OF THE COUNTY OF LONDON QUARTER SESSIONS.

Appeal—Licensing offence—Information by excise officer—Dismissal of information—Appeal by officer—Competence recognized—Appeal from Divisional Court—Objection that no right of appeal—"Criminal cause or matter"—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*a*).

An excise officer exhibited three informations before a court of summary jurisdiction charging an offence against the licensing laws and claiming the penalty of 50*l.* under s. 50, sub-s. 3, of the Finance (1909–10) Act, 1910. The informations were dismissed and the excise officer appealed. The Divisional Court dismissed an application for an order of prohibition directed to the appeals committee of the County of London Quarter Sessions prohibiting them from hearing or determining the appeals. On appeal, the preliminary objection was taken that there was no right of appeal to the Court of Appeal :—

Held: that the order of the Divisional Court was made in a "criminal cause or matter" within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 1 (*a*), seeing that the cause or matter if carried to its conclusion might result in the imposition of the punishment of a fine, and, consequently, that no appeal lay to the Court of Appeal.

The principle laid down in authorities which included *Ex parte Alice Woodhall* (1888), 20 Q. B. D. 832, and *Seaman* v. *Burley* [1896] 2 Q. B. 344, approved in *Amand* v. *Home Secretary* [1943] A. C. 147, applied.

Rex (*Sherry*) v. *County Court Judge and Chairman of Quarter Sessions for County Fermanagh* [1935] N. I. 211 not followed.

Observations of Murnaghan J. in *The State* v. *Judge Fawsitt* [1945] I. R. 183 approved.

Appeal from the Divisional Court (1).

On October 3, 1944, the respondent, Edwin Percival Furber, an officer of excise, exhibited three informations before the chief magistrate at Bow Street police court, against the applicant, alleging that on May 2 and 18, 1944, at 189, Regent Street, he did sell by retail intoxicating liquor without a licence contrary to s. 50, sub-s. 3, of the Finance (1909–10) Act, 1910, thereby rendering himself liable to the penalties prescribed and accordingly claiming a penalty of 50*l*. On November 24, 1944, the chief magistrate dismissed the informations and ordered the respondent to pay fifteen guineas costs. On December 2, 1944, the respondent gave notice of intention to appeal to the County of London quarter sessions against the dismissal of the informations. The appeals came on for hearing before the appeals committee on June 10, 1945, when the applicant took a preliminary objection that the court had no jurisdiction to entertain them on the ground that no appeal lay from the decision of a magistrate dismissing an information. It was contended for the respondent that a right of appeal was given by s. 82 of the Excise Management Act, 1827. The chairman intimated that the committee was of opinion that they had jurisdiction, but the hearing of the appeal was adjourned pending the hearing in the Divisional Court of an application by the applicant for an order of prohibition directed to the justices of the appeals committee prohibiting them from hearing or determining the appeals.

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(1) [1945] K. B. 528 sub nom. *Rex* v. *Keepers of the Peace and Justices for the County of London.*

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The Divisional Court (Humphreys and Croom-Johnson JJ.) dismissed the application, holding that the respondent had a right of appeal under s. 82 of the Act of 1928. The applicant appealed, and on this appeal the respondent took the preliminary objection that there was no right of appeal to the Court of Appeal.

Valentine Holmes K.C. and *Christopher Shawcross* for the respondent. Under s. 31, sub-s. 1 (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925, there is no right of appeal from any judgment of the High Court in any criminal cause or matter except as provided by the Criminal Appeal Act, 1907, or the Act of 1925. The exceptions are not material here and the only question is whether this is a "criminal cause or matter" within the meaning of the subsection. The principle to be deduced from cases dealing with s. 31, sub-s. 1 (*a*), and s. 47 of the earlier Judicature Act which is in similar terms, is that a matter is a criminal matter when it may lead to imprisonment or a fine, and that it does not depend in any way on whether the act committed is criminal: *Reg.* v. *Fletcher* (1); *Mellor* v. *Denham* (2); *Reg.* v. *Whitchurch* (3); *Ex parte Alice Woodhall* (4); *Ex parte Schofield* (5); *Seaman* v. *Burley* (6); and *Robson* v. *Biggar* (7). The principle clearly laid down by these authorities was referred to and approved in *Amand* v. *Home Secretary* (8). There are two cases in Northern Ireland on which the other side may rely. They were both customs cases and not excise cases. Here the matter in question arose entirely under the Excise Management Act, 1827, which by s. 65 provided for the recovery of excise penalties by way of information. Originally that information was exhibited before three or more Commissioners of Excise, but by s. 21, sub-s. 3, of the Inland Revenue Regulation Act, 1890, the power to hear the case was transferred to the justices. There was also a right to recover these penalties before the Court of Exchequer, a right prescribed by s. 57 of the Act of 1827. Whatever might be the position it was clear from the authorities that the proceedings before the justices for an excise penalty was a criminal cause or matter.

(1) (1876) 2 Q. B. D. 43.
(2) (1880) 5 Q. B. D. 467.
(3) (1881) 7 Q. B. D. 534.
(4) (1888) 20 Q. B. D. 832.
(5) [1891] 2 Q. B. 428.
(6) [1896] 2 Q. B. 344.
(7) [1908] 1 K. B. 672.
(8) [1943] A. C. 147, 156, 162.

[They also referred to *Attorney-General* v. *Bradlaugh* (1).]

Slade K. C. and *Colin Duncan* for the applicant. There is nothing here to prevent the appeal being brought from the Divisional Court. When Lord Wright in *Amand* v. *Home Secretary* (2) said that the principle to be deduced " is that if " the cause or matter is one which, if carried to its " conclusion, might result in the conviction of the person " charged and in a sentence of some punishment, such as " imprisonment or fine, it is a criminal cause or matter," he did not refer to a penalty such as is recovered under s. 50, sub-s. 3, of the Finance (1909–10) Act, 1910. Again, the extraordinary position arises, according to the argument advanced by the other side, that an excise offence can be proceeded on in the King's Bench Division (replacing the Court of Exchequer), when there is an undoubted right of appeal to the Court of Appeal, or before the justices, when it is to be regarded as a criminal cause or matter with no right of appeal to this court. The position is the more anomalous because the proceedings by way of information before the justices replaced similar proceedings before the Commissioners of Excise, who had no power to try a criminal cause or matter. Lastly, there is clear authority for the view that the proceedings before the justice were not a criminal cause or matter: *Rex* (*Sherry*) v. *County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (3), where the proceedings were to recover treble duty by way of penalty for a customs offence. There is no justification for distinguishing this case on the ground that it relates to a customs offence. [They referred to Customs Consolidation Act, 1876, s. 186 and Customs and Inland Revenue Act, 1879, s. 218). Another case heard in Northern Ireland is *Firman* v. *Malocca* (4). It is true that it is not directly in point but it is relevant as to the test for a criminal cause or matter. Lastly, *The State* v. *Judge Fawsitt* (5), a decision in Southern Ireland is contrary to the first of the Northern Irish cases cited, which was there considered. Notwithstanding this, the Northern Ireland decision was decided on sound grounds which ought to be applied to the present case.

Valentine Holmes K.C. replied.

Cur. adv. vult.

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(1) (1885) 14 Q. B. D. 667.
(2) [1943] A. C. 162.
(3) [1935] N. I. 211.
(4) [1944] N. I. 91.
(5) [1945] I. R. 183.

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v.
JUSTICES OF THE APPEALS COMMITTEE OF THE COUNTY OF LONDON QUARTER SESSIONS.

Dec. 18, 1945. The judgment of the Court was read by TUCKER L.J. : The test to be applied in deciding whether the judgment under appeal was in a "criminal cause or "matter" within the meaning of s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925, has been laid down by this court in several cases which have recently been considered and approved by the House of Lords in *Amand* v. *Home Secretary* (1). It is not, we think, necessary to refer to more than two of these cases. In *Ex parte Alice Woodhall* (2), the Court of Appeal held that the refusal by the Queen's Bench Division to order the issue of a writ of habeas corpus on behalf of a person who had been committed to prison under s. 10 of the Extradition Act, 1870, was a decision in a "criminal cause or matter" and consequently no appeal lay to the Court of Appeal. In that case Lord Esher M.R., said that the decided cases showed that the words "criminal cause or matter" should receive the widest possible "interpretation" and, later on in his judgment, used these words : "I think that the clause . . . . in question applies to a "decision by way of judicial determination of any question "raised in or with regard to proceedings, the subject-matter of "which is criminal, at whatever stage of the proceedings the "question arises." *Seaman* v. *Burley* (3), was an appeal to the Court of Appeal from a judgment of the Queen's Bench Division on a case stated by justices in an application to enforce payment of a poor-rate by warrant of distress. It was held that the judgment of the Queen's Bench Division was given in a "criminal cause or matter" and that no appeal lay. In that case Lord Esher M.R., said (4) : "But the question is "whether this procedure for the recovery of poor-rate is "criminal or civil for this purpose according to the rule laid "down by this court in the cases on the subject. Those "cases do not give an exhaustive definition, but they decide "that when certain conditions are fulfilled the proceeding "must be treated as a criminal proceeding within the meaning "of s. 47 of the Judicature Act, 1873. It has been held in "those cases, as it appears to me, that when the proceeding is "before magistrates, and it is one which may end in imprison-"ment, it must be considered to be a criminal proceeding "within s. 47 of the Judicature Act, 1873, and therefore one "in which there can be no appeal to this court. In this case

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(1) [1943] A. C. 147.
(2) 20 Q. B. D. 832.
(3) [1896] 2 Q. B. 344.
(4) Ibid. 347.

"the proceeding was before magistrates to enforce payment "of a poor-rate. The person rated might, before the proceeding "was taken, have disputed his liability to the rate and "appealed against the rate to quarter sessions, in which case "there might ultimately have been an appeal to this court, "and possibly to the House of Lords. But the procedure for "enforcement of the rate is by application to justices to issue "a warrant of distress, and in default of distress by imprison-"ment. The cases cited, such as *Mellor* v. *Denham* (1); "*Reg.* v. *Whitchurch* (2); *Ex parte Schofield* (3), and *Payne* v. "*Wright* (4) all seem to me to show that the question is not "whether the proceeding must, but whether it may end in "imprisonment. If it is before justices and may end in "imprisonment, the cases have held that it is criminal within "s. 47 of the Judicature Act, 1873." It is to be observed that Lord Esher emphasizes the nature of the forum, viz.: proceedings before magistrates. Kay L.J., said (5): "I think "we are bound by the decisions on that point to hold that, "though it does not necessarily follow that there will be "a commitment to prison, yet, if the proceedings before "magistrates may have that result, that is enough to show "that the proceeding is in the nature of a criminal proceeding "in which there is no appeal to this court." Later on he used these words: "It appears to me that, if there be "a provision in a statute that that which is merely a civil "liability may be enforced by a proceeding in its nature "criminal, that proceeding is none the less criminal for the "purposes of s. 47 of the Judicature Act, 1873 because it is "applied to a civil liability."

Both these cases were referred to with approval in *Amand* v. *Home Secretary* (6), where Lord Wright summed up the result of the authorities in these words: "The principle which "I deduce from the authorities I have cited and the other "relevant authorities which I have considered, is that if the "cause or matter is one which, if carried to its conclusion, "might result in the conviction of the person charged and in "a sentence of some punishment, such as imprisonment or "fine, it is a criminal cause or matter."

Our task is to apply these principles to this case, which relates to a refusal by the Divisional Court to make an order prohibiting the Justices of the Appeals Committee of the County of London Quarter Sessions from hearing an appeal from an order of a Metropolitan Magistrate dismissing three informations laid against the present appellant for selling intoxicating liquor without having taken out an excise licence, contrary to s. 50, sub-s. 3, of the Finance (1909–10) Act, 1910, and claiming the prescribed excise penalty of 50*l*. The section under which the informations were laid is as follows: "If "any person sells by retail any intoxicating liquor, for the "retail sale of which he is required to take out a licence under "this Act, without taking out such licence, he shall be liable "in respect of each offence, at the election of the Com-"missioners, either to an excise penalty of fifty pounds or "to an excise penalty equal to treble the amount of the "full duty." Section 65 of the Excise Management Act, 1827, provided for the recovery of excise penalties by way of information exhibited before justices of the peace elsewhere than within the limits of the chief office of Excise in London, in which case information might be exhibited before three or more of the Commissioners of Excise. In the latter case a right of appeal was given to Commissioners of Appeal appointed under s. 81 and in the former case to quarter sessions. By s. 21, sub-s. 3, of the Inland Revenue Regulation Act, 1890, the power of the Commissioners to hear and determine such informations was abolished and the jurisdiction in all cases conferred on justices of the peace. It appears that prior to 1827 such penalties had been recovered by proceeding in the Court of Exchequer and this right is expressly preserved by s. 57 of the Excise Management Act, 1827, so that from then onwards the Crown has had the choice of two alternative proceedings in all such cases.

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(1) 5 Q. B. D. 467.
(2) 7 Q. B. D. 534.
(3) [1891] 2 Q. B. 42.
(4) [1892] 61 L. J. (M. C.) 114.
(5) [1896] 2 Q. B. 349.
(6) [1943] A. C. 147, 162.

Mr. Slade, for the appellant in these proceedings, contends that the principles laid down in the cases cited above are inapplicable to, and could not have been intended to extend to, proceedings by Customs or Excise officers to recover penalties which, he says, are purely civil in their nature, and he referred us to the case of *In re Hausmann* (1), in which it was held that an information in the King's Bench Division to recover penalties for smuggling is not a criminal proceeding and that no appeal lies to the Court of Criminal Appeal. Lord Alverstone, in that case, said that the matter was almost concluded by the fact that on such a case appeal lay to the

(1) (1909) 3 Cr. App. R. 3.

Court of Appeal. Although the nature of proceedings before justices for the recovery of customs or excise penalties does not appear to have come before the courts of this country, the matter has recently received consideration by the courts in Northern and Southern Ireland, and Mr. Slade invited us to follow the decision of the Court of Appeal in Northern Ireland in *Rex* (*Sherry*) v. *County Court Judge and Chairman of Quarter Sessions for County Fermanagh* (1), in which it was held that proceedings before justices to recover treble duty by way of penalty for knowingly harbouring uncustomed goods were not proceedings in " a criminal cause or matter," so as to oust the jurisdiction of the Court of Appeal. Andrews C.J., as he then was, gave the leading judgment, in which he dealt with all the cases on the subject, including the decisions of the English courts. In expressing the conclusion at which he had arrived he said (2) : " In my opinion it would be an absurd " conclusion at which to arrive, and one which, I conceive, " would be at variance with the true view of our law, that " when a person is charged with an offence under the Customs " Acts, the character of the proceedings, with all that it " involves, should be determined by the persons arbitrarily " selected either by the Attorney-General or by a Customs " official. It would be doubly absurd if the smaller offences " which would naturally be brought before the justices were " branded as criminal whilst the more serious cases tried in " the High Court were regarded as of a purely civil character." We trust we are not doing injustice to the learned Lord Chief Justice's closely reasoned judgment by selecting this passage as indicating what was, in his view, the really decisive element in the case.

On the other hand, when a very similar question arose in the Courts of Southern Ireland, a different decision was reached by the majority of the court. The case is *The State* v. *Judge Fawsitt* (3). In that case the proceeding under discussion was an information laid before the District Judge to recover a penalty of 100*l*. for attempting to export certain articles for which an export licence had not been obtained. The question in issue was whether such a proceeding was a criminal case within the meaning of a section of an Irish statute, which provided that " an appeal shall lie in all cases " other than criminal cases from any decision of a justice of

(1) [1935] N. I. 211.
(2) Ibid. 233.
(3) [1945] I. R. 183, 193.

"the District Court to the judge of the Circuit Court." The judgment of the majority of the Supreme Court was delivered by Murnaghan J. The authorities were again reviewed, including the decision of the Court of Appeal in Northern Ireland in *Sherry's* case (1), with regard to which Murnaghan J. used these words: "the reasoning of Andrews C.J. in Northern "Ireland largely rests upon the absurdity of proceedings "before justices being a crime, and proceedings for a similar "matter in the High Court not being a crime. If the form of "proceeding is the test of criminal or civil proceedings, "I personally see no absurdity in one proceeding being civil "and the other being criminal. The information at the suit "of the Attorney-General in the High Court is civil because "it is a relic of mediæval procedure, while the proceedings "before the District Justice have all the marks of criminal "procedure and are in no way distinguishable from criminal "proceedings for which the punishment is a penalty with "imprisonment in default of payment."

We respectfully agree with the observations of Murnaghan J. The English cases show that the form of the proceeding *is* the test and this seems to us to be a conclusive answer to the apparent anomaly. We are confirmed in this view by the fact that in *Attorney-General* v. *Radloff* (2), the court was equally divided on the question whether or not an information filed by the Attorney-General for the recovery of penalties for a breach of the customs laws was a criminal proceeding, and the matter was for all practical purposes settled a few years later by the Crown Suits Act, 1865, which provided, by s. 35, that the revenue side of the Court of Exchequer should be deemed to be a court of civil judicature within the meaning of s. 103 of the Common Law Procedure Act, 1854. In this connexion it may be of interest to observe that Blackstone appears to have regarded such information as criminal in their nature: see Blackstone's Commentaries, 8th ed., vol. 4, p. 308, where he writes: "Informations are of two sorts; first, "those which are partly at the suit of the King, and partly at "that of a subject; and secondly, such as are only in the name "of the King. The former are usually brought upon penal "statutes, which inflict a penalty upon conviction of the "offender, one part to the use of the King, and another to the "use of the informer; and are a sort of qui tam actions, (the "nature of which was explained in a former volume) only

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(1) [1935] N. I. 211.

(2) (1854) 10 Ex. 84.

"carried on by a criminal instead of a civil process." It would therefore appear that originally there was no anomaly and that the present apparent anomaly is due to the statutory provision applying the rules of civil procedure, and giving a right of appeal to the Court of Appeal, in a proceeding which was in its origin criminal.

For these reasons we are of opinion that the preliminary objection prevails and that the order of the Divisional Court in this case was made in a "criminal cause or matter," with the result that no appeal lies therefrom to the Court of Appeal.

Preliminary objection allowed : Appeal dismissed.

Solicitors : *H. N. Harrington ; Philip Conway, Thomas & Co.*

H. C. G.

COMMISSIONERS OF INLAND REVENUE *v.* NATIONAL ANTI-VIVISECTION SOCIETY.

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Nov. 20, 21, 22 ; *Dec.* 20.

Lord Greene M.R. MacKinnon and Tucker L.JJ.

Revenue—Income tax—Exemption to charities—Body "established for "charitable purposes only"—Abolition of vivisection—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37.

A society having as its object the total suppression of vivisection is not a "body of persons established for charitable "purposes only," within s. 37 of the Income Tax Act, 1918, so as to be exempt from income tax. In view of the immense benefit shown to be arising from medical research involving the use of vivisection, it is impossible to say that the society's purposes are "beneficial to the community" within the 4th class of charitable trusts laid down by Lord Macnaghten in *Special Commissioners of Income Tax* v. *Pemsel* [1891] A. C. 531, 583 :—

So held by MacKinnon and Tucker L.JJ., Lord Greene M.R. dissenting.

In re Foveaux [1895] 2 Ch. 501 overruled.

Per Lord Greene M.R. As the society's object is to suppress a practice which "involves the ill-treatment . . . . of animals in "a manner which leads to pain and suffering," it is a good charitable object as being morally beneficial to the country. Nor is it prevented from being a good charitable object because great material detriment would result from the achievement by the society of its object.

Appeal from the decision of Macnaghten J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners on December 8, 9 and 10, 1943, they heard a claim by the National Anti-Vivisection Society (hereafter called the society) to exemption from income tax on investment income aggregating 2,876*l.* 15*s.* 7*d.* for the year ended April 5, 1943, on the ground that the society was a body of persons established for charitable purposes only and, as such, was entitled to exemption from tax under the Income Tax Act, 1918, s. 37.

Partly documentary and partly oral evidence was tendered on behalf of the society and also on behalf of the Commissioners of Inland Revenue. The society was a voluntary society governed by rules, having as its general purpose opposition to vivisection, an expression including experiments of every kind on living animals.

The first anti-vivisection societies came into existence in 1875 to 1876 at the time of or after the appointment of the Royal Commission on Vivisection of 1875, which held an inquiry largely at the instance of medical men. As a result, the Cruelty to Animals Act, 1876, was passed, under which medical research through animal experiments had been regulated under the control of the Home Secretary. The Act provided that a person should not perform an experiment calculated to give pain on a living animal, except subject to restrictions imposed by the Act. These restrictions were subject to certain qualifications, which included provisions empowering experiments to be performed without anæsthetics upon a certificate of the Secretary of State that insensibility could not be produced without frustrating the object of the experiment. He was empowered by s. 8 to grant licences subject to any conditions he thought expedient for better carrying into effect the objects of the Act. Owing to the continued agitation during the next thirty years of numerous small anti-vivisection societies a second Royal Commission was appointed in 1906 which reported favourably on what had been achieved by vivisection and expressed the opinion that experiments upon animals, adequately safeguarded by law, faithfully administered, were morally justified and should not be prohibited by legislation. The Secretary of State presented annually to the House of Commons a return of licences granted by him to perform experiments on living animals. In the return for 1938 the following statement appeared: " The experiments performed without anæsthetics, 908,846 in " number, were mostly inoculations and feeding experiments.

" In addition, a certain number consisted of oral administra-" tion, inhalation, external applications and the abstraction " of body fluids. In no instance has a certificate dispensing " with the use of anæsthetics been allowed for an experiment " involving a serious operation. It will be seen that the " operative procedures in experiments performed under " certificate and without anæsthetics are only such as are " attended by no considerable, if appreciable, pain."

In 1925 the Therapeutic Substances Act, 1925, was passed, providing for the regulation of the manufacture, sale or importation of four types of therapeutic substances. The Act provided for prescribing the standard of strength, quality and purity of any of these substances and for prescribing the tests to be used for determining whether the standard prescribed had been attained. These tests could only be carried out by experiments on living animals.

The society was formed in 1875 and was then called " the " Society for the Protection of Animals liable to Vivisection," and later " the Victoria Street Society for the Protection of " Animals from Vivisection, united with the International " Association for the Total Suppression of Vivisection." On July 21, 1897, the present name of the society was adopted. By resolutions passed by the general meeting of the society it was stated: " The object of the society is to awaken the " consciences of mankind to the iniquity of torturing animals " for any purpose whatever; to draw attention to the im-" possibility of any adequate protection from torture being " afforded to animals under the present law; and so to lead " the people of this country to call upon Parliament totally " to suppress the practice of vivisection."

On February 9, 1898, the following explanatory resolution was passed: " The council affirm that, while the demands " for the total abolition of vivisection will ever remain the " object of the National Anti-vivisection Society, the society " is not thereby precluded from making efforts in Parliament " for lesser measures, having for their object the saving of " animals from scientific torture."

The sense in which the society used the word vivisection and the general aim of the society were further evidenced by a large number of statements in its publications set out in the case stated. The society's propaganda literature was (amongst other things) directed to:—(*a*) Prevention of suffering to animals in various forms, encouragement of kindness to

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animals and inculcation of a love of animals in the young; (*b*) examination and criticism of the annual returns of the Home Secretary of licences granted under the Cruelty to Animals Act, 1876; (*c*) opposition to the immunization (by inoculation) of the members of the armed forces against typhoid; (*d*) opposition to the immunization of the civil population against diptheria.

Evidence was also given as to the activities of the society by Dr. R. Fielding-Ould, M.D., M.R.C.P., M.A., the present director and treasurer of the society. Much of the evidence was not challenged, but he gave further evidence to the following effect: The society was not primarily interested in vivisection, and had no political activities. It was not concerned to alter the law by direct action, but merely hoped to educate public opinion so that cruelty might be mitigated. Although, admittedly, the object of the society in 1897 was to call upon Parliament totally to suppress the practice of vivisection, that object has since changed. The society no longer aimed at legislature prohibiting vivisection. It now took the "via media" between the view that vivisection of every sort or kind should be abolished and the view that there ought to be no kind of restriction on vivisection. He concluded by saying that if the knowledge gained was of sufficient value to outweigh the pain and suffering, the society took no objection. In cross-examination, he admitted that there had been no resolution of the society altering its objects as set out in the resolutions of July 21, 1897, and February 9, 1898. The special Commissioners refused to accept that part of Dr. R. Fielding-Ould's evidence.

Evidence (accepted in its entirety by the Special Commissioners) was given on the other side relating entirely to discoveries made as a result of experiments on animals since 1912. This evidence was given by (1.) Major-General Leopold Thomas Poole, D.S.C., M.C., (director of pathology at the War Office), who spoke of the value of experiments on live animals in testing drugs to be used against malaria, yellow fever, typhus and in testing vaccines generally, and said that in determining whether to make an experiment there must be measured, on the one side, the extent of the pain given to the animal and, on the other, the value of the knowledge expected to be acquired as the result of the experiment; (2.) Sir Edward Hellanby, K.C.B., F.R.S., F.R.C.P., who spoke of the value of experimental work on animals to discover Vitamin D and as a result the practical elimination of rickets from this country; (3.) Dr. Robert D. Lawrence, F.R.C.P., who spoke of the value of experiments on animals, which did not appear to cause pain to them, for the discovery of the insulin treatment for diabetes, and (4.) Dr. John William Trevan, F.R.C.P., who spoke of experiments on animals to the extent of about 250,000 annually carried on at the Pharmacological Department of the Wellcome Physiological Research Laboratories, of which 80 per cent. were simple injections. He said the Laboratories provided and tested sera and material for immunization of the Army, R.A.F. and, in part, the Navy, all material used for the immunization of children against diphtheria, and stated that discoveries had been made for the prevention or ease of Addison's disease, beri-beri, pellagra and scurvy, and dealt (in relation thereto) with vitamins B1, B2, C and D1, and also dealt with certain drugs, namely, the sulphonamides, M. and B. 693 and M. and B. 760, discovered as a result of experiments on animals. He said the effect of stopping experiments on living animals, many of which inflicted no pain, would be to stop medical progress. Strong evidence in favour of experiments on living animals was given also by Sir John C. G. Ledingham, C.M.G., F.R.S., Sir William Savage, M.R.C.S., L.R.C.P., Professor Joshua H. Burn, M.A., M.B., Professor G. H. Wooldridge and Sir Leonard Rogers, K.C.S.I., C.I.E., LL.D., M.D., F.R.C.P., F.R.C.S., F.R.S.

On December 29, 1943, the Special Commissioners who heard the appeal gave their judgment in writing, in which they said they were satisfied that the main object of the society was the total abolition of vivisection, including in that term all experiments on living animals, whether calculated to inflict pain or not. They were satisfied that the members of the society were actuated by an intense love of animals and that the work of the society was to a large extent directed towards inculcating a love of animals in the young. But they thought it was proved conclusively by the evidence of the Crown that (*a*) a large amount of present-day medical and scientific knowledge was due to experiments on living animals; (*b*) many valuable cures for and preventatives of illness had so been discovered and much suffering both to human beings and to animals had been either prevented or alleviated thereby. There was no express evidence that any public benefit in the direction of advancement of morals and education would or might result from the society's efforts, but if this must be assumed and if

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they conceived it their function to determine the case by weighing against that assumed benefit the detriment to medical science and research, and consequently to the public health, which would result if the society succeeded in achieving its object, they would hold that the object of the society was gravely injurious to the public benefit. But upon the authorities they regarded themselves as precluded from so holding. In 1895 the society had been held to be a charity in *In re Foveaux* (1) and that case had not been overruled and was certainly approved in *In re Wedgwood* (2). They felt bound also to reject the Crown's argument that as the alteration of the law was a main purpose of the society, its claim to be a charity failed.

Macnaghten J. allowed the appeal from this decision, holding, on authority, that it was for the society to prove affirmatively that it was a society "established for charitable purposes "only" and that the evidence called in opposition proved that the main object of the society was the total abolition of vivisection, and that the attainment of that object, so far from being beneficial, would be gravely injurious to the community. The society appealed.

F. Grant K.C., *Valentine Holmes K.C.* and *Senter* for the society. That the society is a charity is now for the first time contested on the ground that if the society fully achieved its object, vivisection would cease and great physical harm be done. The Crown contends that it is the duty of the court to decide whether the moral benefit arising from the society's aims is outweighed by the physical harm that would result if it completely achieved its object. Macnaghten J. held this was so, but it is no part of the function or duty of the court to balance between moral good and physical evil. The only support for doing so is obtained from the judgment of Russell LJ. in *In re Grove-Grady* (3). A society that promotes moral benefit is one "established for charitable purposes only" and exempted, therefore, from liability to income tax under s. 37 of the Income Tax Act, 1918. It is sufficient that the object of the society should be for the benefit of the community, morally or otherwise: see the fourth category of charities laid down by Lord Macnaghten in *Special Commissioners of Income Tax* v. *Pemsel* (4). The retarding of medical research is no purpose of the society, although it might result if all vivisection ceased. The object of the society is to prevent cruelty to animals by vivisection. It has been recognized that bodies having as their object the benefit of animals are charitable. The question the Crown is asking the court to examine, namely, whether the physical result arising from the complete achievement by the society of its object outweighs the moral benefit, can never be anything but a matter of personal opinion. For that reason the authorities favourable to the society are right. The Crown's contention would go to the root of many kinds of cases, such as dole charities or charities for the propagation of particular religious beliefs. A trust for the benefit of unitarian religion has always been held good: see *Bowman* v. *Secular Society, Ld.* (1).

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(1) [1895] 2 Ch. 501.
(2) [1915] 1 Ch. 113.
(3) [1929] 1 Ch. 557.
(4) [1891] A. C. 531, 583.

Further, the finding of the Special Commissioners here on the documents that the object of the society is the total abolition of vivisection is going too far. The object is to prevent the infliction of pain to animals, a purpose productive of moral benefit and therefore a good charitable object. Lord Herschell in *Pemsel's* case (2) negatives the proposition being advanced by the Crown.

The society has had a clear decision in its favour: *In re Foveaux* (3), a decision of Chitty J. and see *In re Wedgwood* (4). It is incorrect to suggest that Chitty J. said it was not for the court to consider whether the objects of the society were for the public benefit. What he meant was that it was not for the court to balance moral benefit against physical benefit. The first question is whether a benefit is likely to be achieved, and as to that the society is covered by authority which shows there is a moral benefit. In *In re Hummeltenberg* (5) a bequest to the London Spiritualistic Alliance, Ld., for the training and development of suitable persons as mediums, preferably healing mediums, was held to be a good charitable gift. There Russell J. refused to accept the suggestion that the donor of the gift was the person to decide whether the purpose was beneficial to the public, but said it was not a matter for the personal or private opinion of the judge. That is all that Chitty J. meant in *In re Foveaux* (3). Under all four categories of charities laid down by Lord Macnaghten public benefit is an essential aim: see *In re Cranston* (6). If

(1) [1917] A. C. 406, 439, 442.
(2) [1891] A. C. 531, 572.
(3) [1895] 2 Ch. 501.
(4) [1915] 1 Ch. 113, 122.
(5) [1923] 1 Ch. 237.
(6) [1898] 1 I. R. 431, 446.

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that test be satisfied, it is no answer that the aim fully achieved might be very detrimental to the community physically.

[LORD GREENE M.R. "Public benefit" is part of the definition of the fourth category and not of the three others. Has the court ever inquired into the desirability of a charity for the relief of the poor ?]

The view expressed by FitzGibbon LJ. in *In re Cranston* (1) has been expressly approved by Lord Cozens-Hardy M.R. in *In re Wedgwood* (2) and by Lord Hanworth M.R. in *In re Grove-Grady* (3). [They also cited *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society* (4).]

D. L. Jenkins K.C., *J. H. Stamp* and *R. P. Hills* for the Crown. So far as Chitty J. in *In re Foveaux* (5) decided that the question depended only on the existence of public benefit, he was wrong. If one looks at the results of vivisection as a whole, it is impossible to conclude that its suppression would inculcate any moral lesson to the community. If it were a charity, the taxpayer would have to finance, to a large amount every year, a society which would have deprived hundreds of soldiers, sailors and airmen of treatment which saved their lives. Inasmuch as the society, to qualify for exemption from tax, must be established for charitable purposes only, the inclusion as one of its main objects of the repeal of the Cruelty to Animals Act, 1876, and the substitution of legislation making vivisection illegal, is enough to defeat the claim. They referred to *Blair* v. *Duncan* (6) ; *Bowman* v. *Secular Society, Ld.* (7). A trust to secure a change in the law has never been regarded as charitable. It is not illegal, but the court cannot judge whether the proposed change would be beneficial.

In re Cranston (1) should not be followed in the English courts. There was no evidence there that any harm would be done to anyone.

[LORD GREENE M.R. Would it not be a rather serious step for this court to overrule *In re Foveaux* (5) after fifty years ?]

The position has changed since then. The society's case begs the whole question. It relies on the statement that vivisection, as the term is now used, involves cruelty to animals. But the infliction of pain is not necessarily cruel. The cruelty arises when there is a wanton and unnecessary infliction of pain. If the pain is only incidental to some greater benefit, either to humanity or to the animal kingdom, it is not cruelty They referred to *Lewis* v. *Fermor* (1).

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(1) [1898] 1 I. R. 431.
(2) [1915] 1 Ch. 113.
(3) [1929] 1 Ch. 557.
(4) [1928] 1 K. B. 611, 622.
(5) [1895] 2 Ch. 501.
(6) [1902] A. C. 37.
(7) [1917] A. C. 406.

Grant K.C. replied.

Cur. adv. vult.

Dec. 20. Their Lordships read the following judgments:

LORD GREENE M.R. The National Anti-Vivisection Society claim exemption from income tax on their investment income on the ground that they are a body of persons established for charitable purposes only. The claim was admitted by the Special Commissioners, in spite of their view that the objects of the society, so far from being for the public benefit, were gravely injurious thereto. On this ground they would have held that the society could not be regarded as a charity had they not considered themselves bound to hold otherwise by the authority of *In re Foveaux* (2) decided by Chitty J. in 1895, and approved by this court in *In re Wedgwood* (3). Macnaghten J. held on appeal that he ought not to follow *In re Foveaux* (2) in view of certain observations on the decision which I shall presently discuss, and that, as the attainment of the society's object would be gravely injurious to the community, it was impossible to regard that object as charitable. From that decision the society appeals.

It will be convenient at the outset to summarize certain findings of fact of the commissioners. The society is the same body as one of the three bodies concerned in the case of *In re Foveaux* (2) under its then name of "The Victoria Street "Society for the protection of animals from vivisection united "with the International Association for the total suppression "of vivisection." Its main object, as set out in the special case, is still "the total abolition of vivisection, including in "that term all experiments on living animals whether "calculated to inflict pain or not, and (for that purpose) the "repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether"; and "the work of the society is to a large extent directed "towards the prevention of cruelty to animals." The Commissioners held it to have been proved conclusively that "(*a*) a large amount of present day medical and scientific "knowledge is due to experiments on living animals; (*b*) many

(1) (1887) 18 Q. B. D. 532.
(2) [1895] 2 Ch. 501.
(3) [1915] 1 Ch. 113.

"valuable cures for and preventatives of disease have been "discovered and perfected by means of experiments on living "animals, and much suffering both to human beings and to "animals has been either prevented or alleviated thereby. "We are satisfied that if experiments on living animals were "to be forbidden (that is, if vivisection were abolished) a "very serious obstacle would be placed in the way of obtaining "further medical and scientific knowledge calculated to be of "benefit to the public." The weight of the evidence called on behalf of the Crown, and accepted by the Commissioners, dealt with the advances in medical knowledge made by means of experiments on animals in regard to the prevention or cure of various diseases, such as malaria, typhus and typhoid and yellow fever, diphtheria, tetanus, smallpox and diabetes. The treatment of such diseases by inoculation, vaccines or drugs, as the case may be, has been rendered possible by means of experiments on animals, whether for the purpose of ascertaining the causes of the disease, of testing the efficacy of suggested remedial treatments, or of testing the purity of drugs or vaccines. Valuable knowledge has also been gained with regard to the treatment of burns, wound infections and gas gangrene. To all such experiments on animals the society is opposed and (as a logical consequence) it is opposed to immunization of human beings against typhoid and diphtheria.

On the question of the extent to which cruelty or the infliction of pain or suffering is involved in experiments on animals, the matter stands as follows. The Cruelty to Animals Act, 1876, was passed as a result of the report of the Royal Commission on the practice of subjecting live animals to experiments for scientific purposes which was appointed in 1875 and reported on January 8, 1876. The preamble recited that it was expedient to amend the law relating to cruelty to animals by extending it to the cases of animals subjected when alive to experiments calculated to inflict pain. Section 2 prohibited the performance of any such experiment except subject to the restrictions mentioned in the Act and imposed penalties. Section 3 gave a list of the restrictions. It will be noticed that the Act, so far from prohibiting experiments calculated to give pain, in fact recognized that such experiments could lawfully be carried out, provided that the statutory restrictions were complied with. The restrictions limited the permitted experiments to those performed with a view to the specified advancement of knowledge (para. 1) or for the testing of a former discovery (proviso 4) by a person duly licensed (para. 2). The subject of pain is dealt with in paras. 3 and 4 and provisos 2 and 3. Para. 3 provides that the animal must during the whole of the experiment be under the influence of an anæsthetic of sufficient power to prevent it feeling pain, but this is subject to proviso 2, which permits the performance of experiments without anæsthetics on a certificate being given that insensibility would frustrate the object of the experiment. Para. 4 requires that the animal be killed before it recovers from the anæsthetic in cases where pain is likely to continue after the effect of the anæsthetic has ceased or if serious injury has been inflicted ; but this is subject to an exception (proviso 3) where a certificate is given that the killing of the animal would necessarily frustrate the object of the experiment ; in such a case the animal must be killed as soon as that object has been attained. I need not take up time by referring to other provisions of the Act which (s. 22) do not apply to invertebrate animals. The object of the Act, therefore, was to limit and regulate experiments calculated to give pain, to provide (save in exceptional cases) that such experiments should only be carried out under an anæsthetic and that (save in exceptional cases) the animal should be destroyed while still under the anæsthetic. It is apparently contemplated that, save in exceptional cases, pain will be eliminated by the use of anæsthetic, coupled with the destruction of the animal.

One aspect of the practical operation of the Act is to be found in an extract from the Home Secretary's return for 1938, quoted in the case. It appears that in that year 908,846 experiments were performed without anæsthetics, mostly inoculations and feeding experiments, with a certain number of oral administrations, inhalations, external applications and the abstraction of body fluids. Experiments so performed, it is said, are " such as are attended by no considerable, if " appreciable, pain." Further facts bearing on the question of pain are to be found in the evidence accepted by the Commissioners and set out in the case. In para. 9 (*b*) Major-General Poole's views are given. He said that " it was inevitable that they must suffer some pain." This pain was " pure " physical pain," and if the animals were properly treated they did not suffer any " mental pain." He then said that " a certain portion of the experiments involved no pain. In " addition to the tests there was the preparation of anti-" serum. There was practically no pain attached to that ;

"just the prick of a needle." I read this as meaning that the only experiments involving no pain beyond the prick of a needle are the preparation of anti-serum. No other such "painless" experiments are referred to. The "tests" mentioned in this passage are described in para. 9 (*a*) of the case and involve infecting animals with the disease. The meaning attributed by the profession to such a phrase as a "painless" experiment is illustrated in a statement at the end of para. 9 of the case. The witness pointed out that in the case of an experiment which would otherwise cause severe pain, "such "as the burning of a guinea pig," the animal would be anæsthetized and killed before it recovered consciousness and would therefore suffer no pain at all. The word "severe" is worth noting. In para. 12 of the case there is set out a statement by Dr. Trevan with regard to 277,565 experiments conducted in the course of a year at the Wellcome Physiological Research Laboratories. He said that "although there were "grounds for thinking that in the great majority of cases the "animal suffered no pain, it was not always possible to be "certain that some pain might not be involved. In some "cases pain was inevitable." In para. 15 it appears that Professor Burn "did not think it possible to distinguish "between experiments on animals which caused pain and "those which did not cause pain." He took the example of Neoarsphenamine injections. What had to be determined was "the dose with which only 50 per cent. of the animals developed "symptoms terminating in death. It was quite impossible to "know beforehand which of those animals was going to suffer "pain and which was not. It was very difficult to say how "much pain they would suffer, and there would be no possible "means of administering an Act which said that painless "experiments need not be reported to the Home Office, but "those which caused pain must be reported. Therefore any "Act of Parliament which attempted to lay down that there "must be controlled experiments which caused pain, or that "experiments which caused pain must not be allowed, would "in fact prevent all experiments on animals. For example, "feeding experiments, when the deficiency in diet was a "deficiency of vitamin D1, caused convulsions in pigeons. "He could not say that pigeons which had these convulsions "suffered very much pain, but it would be impossible for "anyone to say that they suffered none."

The whole of the evidence to which I have referred was accepted by the Commissioners, and must therefore be regarded as establishing the facts stated by the witnesses. With the possible exception of the preparation of anti-serum referred to by Major-General Poole, who says nothing about consequential illness as distinct from pain, the facts appear to me to show beyond question that, while in the majority of cases pain, illness or, at best, the destruction of the animal is involved, it is quite impossible to say that in any other case pain or illness is not involved. In other words, the experimenters have to take the chance without having any means of knowing whether the animal suffers or not. This examination of the facts satisfies me that the practice, the suppression of which the society wishes to bring about, is one which involves the ill-treatment (to use a less extreme word than "cruelty") of animals in a manner which leads to pain and suffering, or at the best death, after experiment under an anæsthetic. The best that can be said of it from that point of view is that in some cases there may be no pain or suffering, but whether or not this is the case no one can tell. The controversy in the present case is whether, in view of the admittedly great—and indeed overwhelming—advantages derived from the practice of vivisection, the object of totally suppressing the practice is a good and charitable object. Nothing is to be gained by pretending that the practice does not involve ill-treatment of the animals subjected to it; and to say that it does not involve cruelty because the end at which it aims is justifiable, and that, therefore, its suppression cannot be a good charitable object, in truth begs the very question which we have to decide.

It is claimed by the society, and Chitty J. in *In re Foveaux* (1) so decided, that its object falls within the fourth of Lord Macnaghten's classes, namely, "other purposes beneficial to "the community" not falling under any of the three preceding heads. The Crown relies on the findings of the Commissioners that the objects of the society, so far from being beneficial to the community, are positively harmful. The society replies that this conclusion can only be reached by adopting an illegitimate method of reasoning. It is said that the objects of the society, being to suppress a practice which involves cruelty to, or at least ill-treatment of, animals, fall within a well-established category of charity, and that the charitable character of those objects cannot be altered by

(1) [1895] 2 Ch. 501.

pointing to the consequential disadvantages which would flow from the achievement of them. In particular it is said that in the present case this process of reasoning would involve the weighing of the moral benefits accruing to the community by the suppression of cruelty and the inculcation of a love of animals against the material benefits derived from the improvement in medical knowledge. The court, it is said, has no scales in which to weigh material against moral benefits. If, in the present state of knowledge, it were possible to achieve, by some other method, the results obtained by means of vivisection, so that it was merely an alternative which could be dispensed with, I entertain no doubt that the total suppression of vivisection would be a good charitable object. I adopt, with respect, the elevated view of such matters expressed by Swinfen Eady L.J. in *In re Wedgwood* (1): " A gift for the " benefit and protection of animals," he said, " tends to " promote and encourage kindness towards them, to dis-" courage cruelty, and to ameliorate the condition of the " brute creation, and thus to stimulate humane and generous " sentiments in man towards the lower animals, and by these " means promote feelings of humanity and morality generally, " repress brutality, and thus elevate the human race." I accept without hesitation the view that the objects of the society, considered by themselves and without reference to the benefits derived from vivisection, are good charitable objects and fall within a well-established category. Are those objects prevented from being good charitable objects by reason of the fact that the acts to the suppression of which they are directed produce benefits of a very high order to the human race and, indeed, to the animal kingdom itself? It is, I think, the better view that gifts for the benefit of animals derive their charitable status not from the fact that they are for the benefit of animals, but from the fact that the community is benefited. Animals as such cannot, I think, be the beneficiaries under a charitable trust. Apart from the material benefits to be derived from the proper treatment of animals useful to man, the benefit to the community which is derived from the proper treatment of animals is a purely moral one. As Chitty J. said in *In re Foveaux* (2): "Cruelty " is degrading to man and its suppression advances morals " and education among men." The same view appears in the passage quoted above from the judgment of Swinfen Eady L.J. in *In re Wedgwood* (1). The benefit, therefore, to the community at which the society aims is a moral benefit, emphatically not a material one, and it is on that ground alone that the claim that its objects are charitable must be rested.

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(1) [1915] 1 Ch. 113, 122. (2) [1895] 2 Ch. 501.

I will now turn to the authorities. The leading case on the topic of anti-vivisection is *In re Foveaux* (1). The Crown argues that this case was wrongly decided and should be overruled. Alternatively, the Crown says that the facts as they exist to-day are substantially different from what they were when Chitty J. decided it, and that, even if that case was rightly decided, it does not govern the present case. This latter argument (which I do not accept) I will deal with later in this judgment. In *In re Foveaux* (1) the objects of the present appellants were found to be the total abolition of the practice of vivisection as defined in the report of the Royal Commission. This phrase, which refers to the report of 1876, appears to mean "the practice of subjecting live animals to "experiments for scientific purposes," which was the matter on which the Commission was required to report. It was suggested that Chitty J.'s decision was based on the view that the purpose of the maker of an alleged charitable gift was what determined whether or not it was in the eyes of the law charitable. This view cannot to-day be regarded as correct. But I do not think that Chitty J. based his opinion on it, and it is clear that this court in *In re Wedgwood* (2) did not think so either. The real ground of his decision is, I think, that the prevention of cruelty to animals is a charitable object, and that the society existed for the purpose of preventing a particular form of cruelty, namely, vivisection. This view he formed some nineteen years after the passing of the Cruelty to Animals Act, 1876, and with the report of the Royal Commission of 1876 before him, as appears from the record of *In re Foveaux* (1), which we obtained from the Public Record Office. Assuming no relevant difference in the existing circumstances is established, the decision in *In re Foveaux* (1) appears to me to be conclusive of this appeal, unless we are prepared to overrule it. It has stood for fifty years, and has been approved on numerous occasions. The authorities earlier in date than *In re Foveaux* (1) are examined in the judgment itself. It was approved in the Irish Court of Appeal in *In re Cranston* (3), and in 1914 it was emphatically approved in this court in *In re Wedgwood* (2).

(1) [1895] 2 Ch. 501.
(2) [1915] 1 Ch. 113.
(3) [1898] I. R. 431, 446.

There are, however, certain observations in later cases which Macnaghten J. held to justify him in declining to follow *In re Foveaux* (1). The first case is *In re Hummeltenberg* (2). In that case Russell J. (as he then was) negatived, and , in my view, correctly negatived, the view that it was for the donor and not for the court to judge whether a gift was charitable as being for the benefit of the public. He added that the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion on the evidence before it. The gift there in question was for training mediums and did not fall within any established category of charity. In order, therefore, to decide whether or not it could be classed as charitable, Russell J. held that it was necessary to examine the evidence and see whether the object of the gift was beneficial to the community. He rejected the argument that this question fell to be decided by the intention of the testator. I do not think that Russell J.'s words are, or were, intended to be applicable to the case of a gift whose objects fall within an established category of charity. If he so intended, I must respectfully disagree. But the case principally relied on by the Crown is that of *In re Grove-Grady* (3), a decision of this court. The gift there was a peculiar one. The branch of it relevant for present purposes had for its object the acquisition of land for the provision of refuges for the preservation of " all animals, birds or other " creatures not human." All such creatures were to be preserved from molestation or destruction by man. Romer J. held the gift to be a good charitable gift. In the Court of Appeal, Lord Hanworth M.R. stated (4) that societies for the abolition of vivisection are charities within the legal definition and cited *In re Foveaux* (1). He referred to other authorities, and went on to say: "From these authorities it seems clear that " if the object be to enhance the condition of animals that are " useful to mankind, or to secure good treatment for animals, " whether those animals are useful to mankind or not (see per " the Vice-Chancellor in *Armstrong* v. *Reeves* (5), and see per " Wood V.C. in *Marsh* v. *Means* (6)), or to ensure humane " conduct towards, and treatment of, them whether in respect " of a particular subjection of them to the use of mankind, " as for food (*In re Cranston* (7)), or in what is called vivi-

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(1) [1895] 2 Ch. 501.
(2) [1923] 1 Ch. 237.
(3) [1929] 1 Ch. 557.
(4) Ibid. 570.
(5) (1890) 25 L. R. Ir. 325, 341.
(6) (1857) 3 Jur. (N. S.) 790.
(7) [1898] I. R. 431, 446.

"section, such objects are to be deemed charitable." He quoted with approval the passage from Russell J.'s judgment in *In re Hummeltenberg* (1), and proceeded to examine the facts of the case before him. He pointed out that all animals feræ naturæ, including noxious and predatory animals, were included and that the struggle for existence was to be given free play so that the animals living in the sanctuary would be free to molest and harry one another. Such a purpose he considered was not beneficial to animals, and did not denote any elevating lesson to mankind. On these findings the question which arises in this case or anything approaching it did not, of course, arise. Lawrence L.J. dissented, and held that the trust was a valid trust for the protection of animals, and came within the principle of *In re Wedgwood* (2). Russell L.J. (as he then was) began his judgment as follows: "There "can be no doubt that upon the authorities as they stand "a trust in perpetuity for the benefit of animals may be a valid "charitable trust if, in the execution of the trust, there is "necessarily involved benefit to the public; for if this be a "necessary result of the execution of the trust, the trust will "fall within Lord Macnaghten's fourth class in *Pemsel's* case (3), "namely, 'trusts for other purposes beneficial to the com-"'munity.' So far as I know there is no decision which "upholds a trust in perpetuity in favour of animals upon any "other ground than this, that the execution of the trust in "the manner defined by the creator of the trust must produce "some benefit to mankind. I cannot help feeling that in "some instances matters have been stretched in favour of "charities almost to bursting point; and that a decision "benevolent to one doubtful charity has too often been the "basis of a subsequent decision still more benevolent in favour "of another. The cases have accordingly run to fine dis-"tinctions, and, speaking for myself, I doubt whether some "dispositions in favour of animals held to be charitable under "former decisions would be held charitable to-day. For "instance, anti-vivisection societies, which were held to be "charities by Chitty J. in *In re Foveaux* (4) and were described "by him as near the border line, might possibly in the light "of later knowledge in regard to the benefits accruing to "mankind from vivisection be held not to be charities." The trust in question he held not to be a good charitable trust for

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(1) [1923] 1 Ch. 237.
(2) [1915] 1 Ch. 113.
(3) [1891] A. C. 531, 583.
(4) [1895] 2 Ch. 501.

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reasons which may be summarized thus: It was not a trust directed to ensure absence or diminution of pain or cruelty in the destruction of animal life: it would not permit the destruction, however painless, of any animal noxious to mankind or to the other animals or even its destruction in its own interest. The carrying out of such a trust could not benefit the public. He then examined the decision in *In re Wedgwood* (1), and pointed out, correctly, if I may respectfully say so, that that case did not decide that any trust for the protection and benefit of animals necessarily involves a benefit to the community. This proposition appears to me to be beyond argument. A trust, for example, which had as its object, or included among its objects, the preservation of animals noxious to man, such as rats or mosquitoes, could not, I venture to think, be a good charitable trust. Such a trust could not be said to " promote feelings of humanity and " morality," to quote Swinfen Eady L.J. again. No question of moral benefit to the human race would be involved since man is entitled to protect himself as much against noxious animals as against his fellow men if they attack him. In the case of noxious animals, the suppression of cruelty in dealing with them would, however, surely be a good charitable object. Russell L.J. thought that the benefit to humanity to be derived from the gift in *In re Wedgwood* (1) lay in the suppression of cruelty to animals. I do not myself think, if I may respectfully say so, that the decision was based on so narrow a ground; and the weight of authority appears to me to support the proposition that, subject to what I have said with regard to noxious animals, a trust which is really and truly for the benefit of animals (which the trust in *In re Grove-Grady* (2) was not) is a good charitable trust, quite apart from the question of the suppression of cruelty, not because animals themselves are the benficiaries, but because kindness and love towards animals are virtues, the cultivation of which is conducive to the moral advancement of humanity. I should be ashamed to hold otherwise. The proposition is not made untrue by the fact that human weakness or urgent human need persuades or compels individuals or the community at large to sacrifice the moral benefit. When this happens it merely means that a moral problem has been solved in a particular way, and that the end is thought to justify the means. It does not mean that the moral problem does not

(1) [1915] 1 Ch. 113.

(2) [1929] 1 Ch. 557.

exist, or that the means are in themselves free from evil. I should not care to find myself having to argue with anyone who regarded the practice of operations on living animals as anything better than a lamentable necessity.

The decision in *In re Grove-Grady* (1) was to the effect that the trust was not for the benefit of animals and that no benefit to the community could flow from such a trust. These conclusions were arrived at upon a consideration of the facts, in accordance with the principle stated by Russell J. in *In re Hummeltenberg* (2). But if on the facts the court had come to the conclusion that the benefit of animals (excluding animals noxious to man) was the real object of the gift, I venture to think that the decision would have been different. In any case, the decision in no way approaches the present case, and Russell L.J.'s comments on *In re Foveaux* (3), though deserving the utmost respect, were dicta only. Also his proposition that the question of benefit to humanity must be decided on the evidence, although, if I may say so, indisputably correct in relation to the questions which were before him in *In re Hummeltenberg* (2) and *In re Grove-Grady* (1) is liable to serious misconstruction if applied to such a problem as the present. To say that the question is whether the facts bring a gift within a category of charitable gifts is undoubtedly true ; it was so laid down by Russell L.J. in *In re Hummeltenberg* (2) in opposition to the view that the intention of the donor is the decisive factor ; but to say that a gift, the purpose of which is in itself charitable as falling under an established head of charity, can be taken out of that category by proof that the achievement of its purpose would bring in its train countervailing disadvantages is, as it appears to me, a different proposition altogether ; and, apart from the dicta of Russell L.J. (if indeed this is what they mean), I know of no authority which supports it. It is important to follow the reasoning of Russell L.J. on this matter. In *In re Hummeltenberg* (4) he said this : " But no matter under which of the four classes " a gift may prima facie fall, it is still, in my opinion, necessary " (in order to establish that it is charitable in the legal sense) " to show (1.) that the gift will or may be operative for the " public benefit, and (2.) that the trust is one the adminis- " tration of which the court itself could if necessary undertake " and control." It is quite clear that in referring to " public

(1) [1929] 1 Ch. 557.
(2) [1923] 1 Ch. 237.
(3) [1895] 2 Ch. 501.
(4) [1923] 1 Ch. 240.

"benefit" the emphasis is on the word "benefit," that is, the statement is not merely asserting that in all charitable gifts the necessary element of publicity must be present. Now this proposition cannot, I think, mean that a gift which prima facie falls under one of the first three of Lord Macnaghten's classes, for example, a gift for the relief of poverty, or a gift for the advancement of religion, can fail to be regarded as charitable on the ground that it may be thought to be in fact, on balance, calculated to injure rather than to benefit the community. No attempt of the kind, so far as I have been able to discover, has ever been made, much less succeeded. Cases have, of course, occurred in which a question has arisen whether the object of a gift is truly the advancement of religion or education or the relief of poverty. But I know of no case in which, this question having been answered in the affirmative, the gift was nevertheless held not to be a charitable gift. The case of "dole" charities is a good example. These have always been regarded as good charities; but in directing schemes the court has refused to sanction the augmentation of the doles or to increase their number, not because they were not charitable, but because the court in its discretion has regarded them as mischievous in their results. This was strongly put by Kindersley V.C., in *Attorney-General* v. *Marchant* (1): "I think, by common "consent," he said, "it is established at the present day "that there is nothing more detrimental to a parish, and "especially to the poor inhabitants of it, than having stated "sums periodically payable to the poor of that parish by way "of charity . . . . The only effect of such gifts is to "pauperize the parish . . . . I think it would be detrimental "to the poor of these parishes to increase what has already "been dedicated to them by the testator"; and Jessel M.R., in *In re Campden Charities* (2), said of such a gift: "There is "no doubt that it tends to demoralize the poor and benefit "no one." And in *Pemsel's* case (3) itself, Lord Herschell said this: "It is a mistake to suppose that men limit their "use of the word 'charity' to those forms of benevolent "assistance which they deem to be wise, expedient, and for "the public good. There is no common consent in this "country as to the kind of assistance which it is to the public "advantage that men should render to their fellows, or as to

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(1) (1866) L. R. 3 Eq. 424, 431.
(2) (1880) 18 Ch. D. 310, 327.
(3) [1891] A. C. 572.

"the relative importance of the different forms which this "assistance takes. There are some who hold that even "hospitals and almshouses, which are specially mentioned by "the legislature, discourage thrift, and do upon the whole "harm, rather than good. This may be an extreme view "entertained by few, but there are many who are strongly "convinced that doles, and other forms of beneficence, which "must undoubtedly be included, however narrow the definition "given to the term 'charitable purpose,' are contrary to the "public interest; that they tend to pauperize and thus to "perpetuate the evil they are intended to cure, and ought to "be discouraged rather than stimulated. It is common "enough to hear it said of a particular form of almsgiving "that it is no real charity, or even that it is a mischievous "form of charity. I think, then, that a purpose may be "regarded by common understanding as a charitable purpose, "and so described in popular phraseology even though "opinions differ widely as to its expediency or utility."

The existing categories of objects regarded by the law as charitable have been fixed by judicial decision. Lord Macnaghten summarized and classified those categories. A gift which is shown in fact to be for the advancement of education or of religion, or for the relief of poverty, must, in my opinion, be treated by the courts as a good charitable gift, just as if a statute had laid it down that a gift of such a description was a good charitable gift. Once the fact is established, any inquiry into consequence appears to me to be irrelevant. But it is argued that, however true this may be of Lord Macnaghten's first three classes, it cannot be true of the fourth, which actually speaks of objects "beneficial "to the community." But this is to misunderstand Lord Macnaghten's language. His fourth class sweeps up a variety of objects which had been, or might in the future be, held to be beneficial to the community. In the present case, if my view of the authorities is correct, the prevention of cruelty to, or the infliction of pain upon, animals, and the benefit of animals not noxious to man, are good charitable objects which have been held to be beneficial to the public, and I do not see how at this time of day it can be asserted that a particular exemplification of those objects is not beneficial merely because in that particular case the achievement of those objects would deprive mankind of certain consequential benefits, however important those benefits may be. If this were not so, it would always be possible, by adducing evidence which was not before the court on the original occasion, to attack the status of an established charitable object to the great confusion of trustees and all others concerned. Many existing charities would no doubt fall if such a criterion were to be adopted. It is to be noticed that Russell L.J. himself, in speaking of *In re Foveaux* (1), went no further than to say that anti-vivisection societies "might possibly in the light of "later knowledge in regard to the benefits accruing to man- "kind from vivisection be held not to be charities." This is far from suggesting that *In re Foveaux* (1) was wrongly decided as the Crown now asserts. It appears to mean that an object which was originally charitable may subsequently become non-charitable because of an increase in the benefits derived from the practice at the suppression of which it is aimed. This, if I may say so, with the utmost respect, is to me a novel conception, and, in the absence of authority binding on me, I am unable to accept it.

The alternative argument of the Crown, namely, that in the light of the facts as known to-day the objects of the society, however charitable they were at the date of *In re Foveaux* (1), cannot be regarded as charitable to-day because of the increase of the benefits derived from vivisection, is based on this interpretation of Russell L.J.'s words. But, apart from the objections which, for my part, I see to the proposition of law involved, the argument appears to me to break down on the facts. The benefits derived from vivisection were in 1895 very great indeed, as appears from the report of the Royal Commission which, as I have said, was in evidence before Chitty J., a fact which can only be ascertained by an examination of the record. Russell L.J. does not appear to have been aware of this. It is true that a large field of benefit to humanity has since been opened up, particularly in regard to the treatment of disease, but if these benefits are now to be regarded as sufficient to deprive a gift aimed at the suppression of the ill-treatment of animals of its charitable character, I cannot see why the known benefits were not sufficient in 1895. But Chitty J. did not even inquire into that matter. In the present case an additional argument is available which I find convincing, that an object which falls within an established category of charity, if its qualification for holding that status consists in a moral benefit to the community, cannot be taken out of that category by proving that great material benefits are derived from the practice which the gift aims at suppressing. I cannot see how any court can be asked to weigh material against moral benefit, however easy a particular judge, speaking as an individual, may find it to solve the problem involved in a manner satisfactory to his own conscience.

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(1) [1895] 2 Ch. 501.

Mr. Stamp argued that *In re Foveaux* (1) was wrongly decided because, as he said, Chitty J. had misused the word "cruelty." That word, he said, could not properly be used to describe the justifiable infliction of pain, and he quoted the case of *Lewis* v. *Fermor* (2). That case was decided on the special language of a criminal statute and has not, in my opinion, any general application. In 1895, as in 1945, the supporters of vivisection were maintaining that the infliction of pain was justifiable: but as Chitty J. said (3): "The "question of what is and what is not justifiable is a question "of morals on which men's minds may reasonably differ and "do in fact differ." In any case, the view that the suppression of cruelty is a necessary factor in a charitable gift for the benefit of animals is not, as I have already indicated, one to which I can subscribe.

The last argument on which I must say a word is to the effect that the objects of the society are in part at any rate non-charitable, in that they comprise the repeal of the Cruelty to Animals Act of 1876 and the promotion of legislation forbidding experiments on living animals. These objects, it is said, are "political" and "political" objects are not charitable. Lord Parker in *Bowman* v. *Secular Society, Ld.* (4), referred to the objects of the Secular Society which comprised matters of acute political controversy. It is, I think, in reference to matters of that kind that Lord Parker's language must be interpreted when he says "a trust for the "attainment of political objects has always been held invalid, "not because it is illegal . . . . but because the court has no "means of judging whether a proposed change in the law will "or will not be for the public benefit." I feel difficulty in applying these words to a change in the law which is, in common parlance, a "non-political" question. I do not in any case think that they can apply when the desired legislation is merely ancillary to the attainment of what is, ex hypothesi,

(1) [1895] 2 Ch. 501.

(2) 18 Q. B. D. 532.

(3) [1895] 2 Ch. 507.

(4) [1917] A. C. 406, 442.

a good charitable object. If before the passing of the various statutes relating to cruelty to animals a society having as its object the suppression of cruelty to animals had included, as a means of attaining its main object, the ancillary object of obtaining the enactment of that very legislation, it could scarcely have been said that it thereby lost its status as a society established for charitable purposes only. A charitable institution must surely be at liberty to achieve its object by the most efficient and practical means, which may well be legislation. Some of the difficulties arising from Lord Parker's language are discussed in Tudor on Charities, 5th ed., p. 41. I would allow the appeal.

MacKinnon L.J.: The appellant society made a claim in December, 1943, before the Special Commissioners of Income Tax, to be exempt from income tax on its income from investments amounting to 2,876*l.* 15*s.* 7*d.* That claim was based on s. 37 of the Income Tax Act, 1918, which provides for such exemption for the income from investments " of any body of " persons or trust established for charitable purposes only." If this society is established " for charitable purposes only," those purposes must be within the fourth category in Lord Macnaghten's famous definition in *Special Commissioners of Income Tax* v. *Pemsel* (1), namely, as being " a trust for other " purposes beneficial to the community not falling under any " of the preceding heads." Whether this society is " established for charitable purposes only" that is, " for " purposes beneficial to the community," is clearly a question of fact to be decided on evidence. The Commissioners heard a considerable amount of evidence, and its details are clearly stated in the special case. Having read that account of the evidence, I am abundantly satisfied that the avowed purposes of this society are not beneficial to the community. Indeed, I am equally satisfied that the successful achievement of those purposes would inflict incalculable injury on the community and on all mankind. The primary avowed purpose of the society is to induce the legislature " totally to suppress the " practice of vivisection." Other avowed objects are (1.) " opposition to the immunization (by inoculation) of the " members of the armed forces against typhoid," and (2.) " opposition to the immunization of the civil population " against diphtheria." Of the immense benefits to mankind which medical research has conferred by means of what is summarily called vivisection there was an imposing body of testimony. This evidence, say the Commissioners in the special case, " we accepted in its entirety." It is probably not too much to say that those benefits equal, if the sum of them does not exceed, the blessings on mankind bestowed earlier by the labours of Jenner, Simpson and Lister. The main purpose of this society is to put an end to all further medical research of this character, and its avowed aim of preventing inoculation against typhoid and diphtheria is to deprive mankind of some of the benefits that such medical research has already conferred on it. In short, the purposes of this society, so far from being " beneficial to the community," might, with reason, be stigmatized as malignantly designed for the injury of the community. It is not surprising that the Commissioners state as their own conclusion of fact on the evidence that " the object of the society, so far from being " for the public benefit, is gravely injurious thereto, with the " result that the society cannot be regarded as a charity." I cannot imagine that any body of sensible men, on the evidence produced to them, could arrive at any other conclusion.

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(1) [1891] A. C. 583.

But though this was their conclusion as sensible men upon the facts, the Commissioners were unhappily persuaded that, as a matter of law, by reason of a reported case, they were constrained to hold that this society is established for purposes beneficial to the community. That case is *In re Foveaux* (1) which was decided by Chitty J. as he then was, fifty years ago. It concerned bequests to two anti-vivisection societies, and the question was whether these were good charitable bequests. That question, as I conceive, involved the determination of an issue of fact. The learned judge says (2) : " To be a charity " there must be some public purpose—something tending to " the benefit of the community." As it appears to me, the issue which he was called upon to decide was : " Has it been " proved to me, by the evidence to which I have listened, " that the purposes of these societies are beneficial to the " community ? " Incidentally, I may remark, it is not possible to discover from the report what was the evidence called at the hearing. The judge makes no reference to it in his judgment. At the hearing of this appeal the Master of the Rolls sent to the Record Office for the file of *In re Foveaux* (1). From that it appeared that the material before

(1) [1895] 2 Ch. 501. (2) Ibid. 504.

the court by way of evidence was the report of the Royal Commission on Vivisection of 1876. I have not had an opportunity of looking at that weighty volume, and I do not think it was necessary for me to do so. I expect that the Royal Commissioners referred to, and possibly quoted, the evidence of witnesses before them, and that there was sharp conflict of opinion between such witnesses. If, however, I am right in thinking that the issue to be determined by the learned judge was : " Has it been proved to me, by the evidence " adduced before me, that the purposes of these societies are " beneficial to the community ? " he in terms declined to fulfil that task, giving as his reason that on this disputed issue it was the duty of the court to " stand neutral." He says (1) : " The court does not enter into, or pronounce any opinion " on, the merits of the controversy which subsists between the " supporters and opponents of the practice of vivisection. It " stands neutral." And in the last words of his judgment (2), he says : " The intention (of these societies) is to benefit the " community ; whether, if they achieved their object, the " community would in fact be benefited is a question on which " I think the court is not required to express an opinion." I do not understand this reasoning. Surely " the controversy " between the supporters and opponents of the principle of " vivisection " is simply whether the practice of that principle is or is not of benefit to the community ? And that was the issue which the court was called upon to determine. In deciding any issue of fact a tribunal cannot " stand neutral." It must decide that one party to the dispute is right and the other party wrong. As it seems to me, the learned judge was declining to decide the very issue that was raised before him. In finding, as he does (2), that " the intention of these societies " is to benefit the community," the judge did not, so far as I know, rely on evidence he had heard or read, but rather on the fact that societies for the prevention of cruelty to animals had, in previous cases, been held to be charitable, and on an assumption that the purpose of these societies was to prevent cruelty to animals. For, after referring to the cases about societies for the prevention of such cruelty, he adds : " It " would seem to follow that a society for the prevention of " a particular form of cruelty to animals is also charitable " . . . . Cruelty is degrading to man ; and a society for the " suppression of cruelty to the lower animals, whether

(1) [1895] 2 Ch. 503. (2) Ibid. 507.

" domestic or not, has for its object not merely the protection " of animals themselves, but the advancement of morals and " education among men." This seems to me to confuse the motives of those who support such a society as this with their money with the purposes of the society that receives and uses that money. I readily assume that the motive which leads old women to make bequests to this society is concern for the welfare of the dear dogs. As one who has more than once experienced the grief of losing a beloved spaniel, I can respect and applaud that motive : though I do not think my respect and applause can be expected when it becomes a matter of the dear guinea-pigs and the dear rats. But the motive of those who provide the money is immaterial. So, I think, it was rightly held by Russell J., as he then was, in *In re Hummeltenberg* (1). The head-note seems properly to summarize his judgment : " The opinion of the donor of a gift or " the creator of a trust that the gift or trust is for the public " benefit does not make it so ; the matter is one to be " determined by the court upon the evidence before it." And he disagrees (2) with " a sentence in the judgment in *In re* " *Foveaux* " (3) to the contrary.

On the reasoning and assumption of Chitty J., I conceive that a society, whose object was to secure legislation making illegal the manufacture and sale of rat-traps and rat poisons, would have to be held established for charitable purposes ; and that the more readily if the tribunal insisted on " standing " neutral " on the question whether rats are, or are not, vermin that are a menace to mankind. Indeed, if it be true, as some may think, that

" the poor beetle, that we tread upon,
" In corporal sufferance finds a pang as great
" As when a giant dies,"

a society to promote legislation to prohibit the manufacture and sale of all insecticides would seem to have good ground for a like claim.

For these reasons, I cannot think that *In re Foveaux* (3) constrains me, as the Commissioners thought it constrained them, to hold that the society is " established for charitable " purposes only." It was said in argument that that case has been referred to without disapproval, or even with approval, in this Court. That may be so : but the references were only

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(1) [1923] 1 Ch. 237.
(2) Ibid. 242.
(3) [1895] 2 Ch. 501.

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to incidental matters. The main ground of the decision has never been the subject of discussion and review, and a serious doubt as to its correctness was voiced by Russell L.J. in *In re Grove-Grady* (1). In this appeal its correctness is directly involved, and for my part I think it should be overruled. In truth that phrase need not be used, and is perhaps inaccurate. Chitty J., in *In re Foveaux* (2), had to decide a question of fact, though, as I think, he declined to decide it. The question to be decided here is one of fact, and it would be more correct to say that some of the considerations stated by the learned judge in *In re Foveaux* (2), as relevant to his conclusion, cannot be regarded as admissible. In the result my conclusion is that the decision of Macnaghten J., allowing the appeal from the Commissioners was right, and that this appeal from his judgment should be dismissed with costs.

TUCKER L.J.: Approaching, as I do for the first time, the question of the application of Lord Macnaghten's fourth division in his definition of charitable trusts in *Pemsel's* case (3), namely, " trusts for other purposes beneficial to the com-" munity not falling under any of the preceding heads," and experiencing some difficulty in ascertaining from the authorities the principles that have been applied, I am relieved to find that others more familiar with the subject have not met with any greater measure of success. In Tyssen's " Charitable " Bequests," 2nd ed., p. 103, the authors write: " There " remains the fourth of Lord Macnaghten's heads, namely, " other purposes beneficial to the community not falling under " any of the preceding heads. These purposes cannot be " classified or reduced to any principle. All we can do is to " look at the cases and see what has been decided." More recently in an article in the Law Quarterly Review for July, 1945, from which I have derived much assistance, it is said: " The fourth head, gifts for the benefit of the community, is " a collection of disjointed decisions, for which no complete " definition or connecting principle has ever been enunciated." If these statements are correct, as I am inclined to think they are, the Court of Appeal is, at any rate, left with a considerable measure of freedom in deciding any particular case that comes before it. Although no complete or satisfactory connecting principle may be discernible, certain propositions are, I think,

(1) [1929] 1 Ch. 582.

(2) [1895] 2 Ch. 501.

(3) [1891] A. C. 531.

established which afford some guidance to the correct approach to the problem. Two of the propositions are as follows: (1.) Not all trusts beneficial to the community are charitable. Benefit to the community is an essential requisite, but there is a further necessary, if somewhat elusive, element, namely, that the trust should be analogous to trusts for purposes enumerated in or within the spirit of the Statute of Elizabeth (see *Attorney-General* v. *National Provincial Bank* (1)). (2.) The question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion on the evidence before it. It does not depend on the intention of the donor: (see *In re Hummeltenberg* (2) and *In re Grove-Grady* (3)). No. 2 is, in my view, vital to the decision of the present case, which raises the question of the admissibility of certain evidence led for the purpose of negativing any presumption there might otherwise have been that the objects of this society were or might be beneficial to the community. If this is a matter for the court to decide, and if communal benefit is essential, on what evidence is the court to act? Upon what principle can it be said that the court must arrive at its decision without hearing evidence as to the inestimable benefits or incalculable harm that may result to the community in any particular case? If it be said that the court is being called upon to perform an impossible task, or one better suited to the legislature, I would answer that this might be a good reason for removing such matters from the purview of the courts, but that it can be no justification for requiring the courts to adjudicate blindfold. No authority has been cited for the proposition that such evidence is inadmissible save the statements of Chitty J. in *In re Foveaux* (4), where he says, referring to this particular society: " In determining this question of charity the court " does not enter into or pronounce any opinion on the merits of " the controversy which subsists between the supporters and " opponents of the practice of vivisection. It stands neutral." and later (5): " The purpose of these societies, whether they " are right or wrong in the opinions they hold, is charitable " in the legal sense of the term. The intention is to benefit " the community; whether, if they achieve their object, the " community would in fact be benefited is a question on which

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(1) [1924] A. C. 262.
(2) [1923] 1 Ch. 237.
(3) [1929] 1 Ch. 557.
(4) [1895] 2 Ch. 501, 503.
(5) Ibid. 507.

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"I think the court is not required to express an opinion." With great respect, this seems to me to conflict with the later decisions in *In re Hummeltenberg* (1) and *In re Grove-Grady* (2) to the effect that it is the function of the court to decide the question of benefit to the community on the evidence before it, and appears to be an abdication by the court of its functions in favour of the intention of the donor based on some supposed irrebuttable presumption of moral benefit to the community, resulting from a movement directed to the alleviation or prevention of suffering amongst animals. In this connexion I would observe that in the case of societies for the prevention of cruelty to animals, one would not normally expect to find any conflict between the moral benefit and the material disadvantages to man resulting from the diminution of cruelty. We are, as a race, peculiarly solicitous for the welfare of animals, but, none the less, both the law and the practice of society recognize that animals may be used for the service and benefit of man, even at the expense of the infliction of some suffering. The offence of "cruelty" broadly speaking, involves an element of wantonness or the causing of unnecessary suffering, and, in considering what is necessary or justifiable, the requirements of man are to some extent taken into consideration. If, however, in the case of a trust for the benefit of animals, such a conflict does arise, it is, in my view, the duty of the court to decide, and to decide on the evidence adduced with reference to the resulting benefit or detriment to the community.

Counsel for the society relied on the passage in the judgment of Fitzgibbon L.J. in *In re Cranston* (3), quoted with approval in *In re Wedgwood* (4), by the Master of the Rolls, in which he said: "Any gift which proceeds from a philanthropic "or benevolent motive, or which is intended to benefit an "appreciably important class of our fellow creatures (including, "under decided cases, animals), and which will confer the "supposed benefit, without contravening law or morals, will "be charitable." Here I would emphasize the words "and "which will confer the supposed benefit" as indicating the duty of the court to inquire whether the benefit will in fact result. These words were again quoted with approval by Lord Hanworth M.R., in *In re Grove-Grady* (2), but as it is clear from the judgments in that case that the court con-

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(1) [1923] 1 Ch. 237.

(2) [1929] 1 Ch. 557.

(3) [1898] 1 I. R. 431.

(4) [1915] 1 Ch. 113.

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sidered that benefit to the community, and not merely to the animals was necessary, I doubt whether it was intended to endorse the view, if, indeed, Fitzgibbon L.J. ever held it, that benefit to the animal alone, irrespective of any resulting moral or material benefit to mankind, would suffice to satisfy the requirements of Lord Macnaghten's fourth head. However, this may be, I know of no English authority for the proposition that, once some benefit to animals is established, the court is precluded from receiving evidence as to the corresponding detriment to mankind. Such a proposition appears to me to be negatived by the whole trend and reasoning of Russell L.J.'s judgment in *In re Grove-Grady* (1). If such evidence is admissible, as, in my opinion, it is, this case is concluded in favour of the Crown, since the evidence given before, and accepted by, the Special Commissioners was all one way and stood uncontradicted and unchallenged.

I am in complete agreement with the judgment of Macnaghten J., and consider that this appeal should be dismissed, and that the case of *In re Foveaux* (2) must be overruled.

Appealed dismissed.

Solicitors: *Shield & Son; Solicitor of Inland Revenue.*

H. C. G.

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(1) [1929] 1 Ch. 557.

(2) [1895] 2 Ch. 501.

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Oct. 29, 30; Dec. 6.

Scott and Tucker L.JJ., and Evershed J.

Landlord and tenant—Notice to quit—"On or before" a fixed date—Validity.

A notice given by the landlord to the tenant to quit "on or "before" a fixed date is prima facie valid and effective. The effect of such a notice is, first, to give the tenant notice to determine the tenancy on the date named and, second, to make the tenant an offer to accept a determination of the tenancy on any earlier date of the tenant's choice, on which the tenant should give up possession of the premises.

Dicta of Lush J,. in *Queen's Club Gardens Estates, Ld.* v. *Bignell* [1924] 1 K. B. 117, 122, disapproved.

APPEAL from Poole county court.

The plaintiff, Mrs. W. A. M. Dagger, was the landlord of a house known as "Kenwood," Poole Road, Wimborne, Dorset, of which the defendant was tenant. By a tenancy agreement dated March 28, 1939, the plaintiff let the premises to the defendant for one year from March 25, 1939, at 50*l.* a year, with an option to the tenant, on giving three months' notice, to continue the tenancy as a quarterly tenancy. The tenancy was so continued, but towards the end of 1944 the plaintiff required the house for her own occupation. On December 20, 1944, the plaintiff's solicitors wrote to the defendant a letter in which they said: "On behalf of our "client, Mrs. W. A. M. Dagger, we hereby give you notice to "quit 'Kenwood' on or before the 25th March next. As "we have already informed you, Mrs. Dagger requires "possession of the house in order to occupy it herself with "members of her family." The defendant failed to give up possession of the house on March 25, 1945, and the plaintiff thereupon brought this action, claiming possession and mesne profits.

At the hearing at Poole county court it was contended for the defendant that the notice to quit on or before March 25 was bad for uncertainty. The judge upheld that contention and gave judgment for the defendant, observing that he and others had decided that point before. The plaintiff appealed.

Rees-Davies for the plaintiff. The county court judge was wrong in holding that the notice was invalid because it used the words "on or before." In any case he should first have considered the nature of the tenancy and the position under the Rent Restriction Acts, even though no argument on that point was addressed to him, because if it appeared that there was a statutory tenancy, there was no need to consider the notice to quit at all and he could have proceeded to consider the question of "greater hardship" under para. (*h*) of the first schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The Court of Appeal is entitled to consider that point now, although it was not taken in the county court: *Salter* v. *Lask* (1). In *Morrison* v. *Jacobs* (2) it was held that where the tenancy of a house within the Rent Restriction Acts came to an end and the tenant remained in possession, he did so not as a common law tenant, but as a statutory tenant, and it was not obligatory to serve a notice to quit on him. As to the validity of the notice, a notice to quit "on or before" a date which is a due date for determina-

(1) [1924] 1 K. B. 754.

(2) [1945] K. B. 577.

tion of the tenancy is clear and unambiguous and therefore valid. It means: "You must leave on that date in accordance "with our contract of tenancy, but it is optional for you to "leave on any day between now and that date." That is a clear notice to quit on a specific date with an option attached to it. The tenant would not necessarily have that option in any case, because if he left earlier than the date specified in the notice he would remain liable for rent up to that date, whereas if he left under the option given by the words "on "or before" he would receive a corresponding remission of rent. The main consideration in a notice to quit is that there should be no danger of its misleading the tenant. In *Queen's Club Garden Estates, Limited* v. *Bignell* (1), Lush J. expressed a doubt whether a notice to quit was valid where the landlord mentioned a specific date for the termination of the tenancy and added that "on or before" that date he would require possession. But it is a principle that the court will, if possible, uphold a notice to quit, and other judges have even said that the language should, if necessary, be strained to uphold such a notice. Further, the attention of Lush J., was apparently not called to the decisions that a notice to quit must be construed favourably to its validity. At the most he was expressing a doubt.

There is a heavy onus to be discharged by the party attacking a notice to quit, for the court may import words into a notice to give it a rational meaning. That is what the court should do here. [He referred to *Wride* v. *Dyer* (2) and *Doe* v. *Smith* (3).] In *Doe* v. *Culliford* (4), Abbott C.J. said: "There is one rule of construction in cases of this nature, "which is no less sound than ancient, namely, to give such "a sense to ambiguous words, as will effectuate the intention "of the parties." And in the same case Bayley J. said (5): "When general language is used, which is open to doubt, "the rule is to make it sensible, not insensible . . . . He "[the landlord] intended to give an effective notice, and it is "quite sufficient if the tenant understands what is meant." In *De Vries* v. *Sparks* (6) it was rightly held that an agreement to vacate possession on or before a certain date was not a valid notice to quit, because it was not a notice to quit at all. The effect of the words "on or before" was not fully argued in

(1) [1924] 1 K. B. 117, 122.
(2) [1900] 1 Q. B. 23.
(3) (1836) 5 Ad. & E. 350.
(4) (1824) 4 D. & R. 248, 249.
(5) Ibid. 249.
(6) (1927) 137 L. T. 441.

that case. The most that can be said against the notice to quit in the present case is that it is slightly ambiguous and if that is so the court should uphold it.

Beney K.C. and *E. S. Fay* for the defendant.

The county court judge was not entitled, in the absence of a request to amend, to proceed beyond these pleadings, which, as they stood, in his opinion disclosed a contractual tenancy still in being because not validly determined. *Morrison* v. *Jacobs* (1) was not new law, and *Shuter* v. *Hersh* (2) decided the same point. A notice to quit on or before a fixed date is not a valid notice. In *De Vries* v. *Sparks* (3), Salter J. pointed to the difference between a notice to quit and an agreement between the parties to determine a tenancy and said that if the agreement in that case, which was to vacate possession on or before a certain date, was to be regarded as a notice to quit it would be invalid as not being a notice to expire on a fixed date. In the present case there was no agreement but it was a unilateral decision of the landlord to determine the tenancy. In the case of a notice to quit there must be plainness of speech: *Gardner* v. *Ingram* (4); *P. Phipps & Co. (Northampton & Towcester Breweries), Ld.* v. *Rogers* (5). No doubt the court, in construing such documents, will lean in favour of reading them in such a way as to give them validity, but where such a document is inaccurate in some way it is not possible to ignore the inaccuracy and substitute the correct particular because it appears that the error was inserted by a slip: *Hankey* v. *Clavering* (6), per Lord Greene M.R. There is no expression of an offer in the letter giving the defendant notice to quit. It is all a demand and nothing else. In *Doe d. Richmond, Mayor* v. *Morphett* (7) a notice to quit on a fixed date " or upon such other day or " time as the current year for which you now hold the same " will expire " was held bad. And in *Queen's Club Gardens Estates, Ld.* v. *Bignell* (8), Lush J. said: " I very greatly " doubt whether a notice to quit . . . . can be said to be " valid in which the landlord mentions a specific date for the " termination of the tenancy and adds that ' on or before ' that " date they will require possession." The county court

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(1) [1945] K. B. 577.
(2) [1922] 1 K. B. 438.
(3) (1927) 137 L. T. 249.
(4) (1889) 61 L. T. 729.
(5) [1925] 1 K. B. 14.
(6) [1942] 2 K. B. 326, 329.
(7) (1845) 7 Q. B. 577.
(8) [1924] 1 K. B. 117, 122.

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judge was right in holding that the notice to quit in the present case was invalid and in dismissing the action.

Rees-Davies replied.

Cur. adv. vult.

Dec. 6. The judgment of the court was read by:

EVERSHED J. This is an appeal from an order of the Poole county court dismissing with costs the action of the plaintiff, the landlord of certain premises known as "Kenwood," Poole Road, Wimborne, in Dorset. The claim of the plaintiff was for an order for possession of the premises, which were, and are, in the occupation of the defendant, and for consequential relief. The premises were and are within the protection of the Rent Restriction Acts. By her points of claim the plaintiff alleged that the premises were occupied by the defendant under the terms of an agreement dated March 25, 1939, and that "the said tenancy was duly "determined by notice to quit dated the twentieth day of "December, 1944, and expiring on the twenty-fifth day of "March, 1945." The plaintiff then alleged facts designed to bring the case within para. (*h*) of the first schedule to the Act of 1933. The particulars of defence in substance put in issue the whole of the matters alleged by the points of claim.

It is to be observed that the plaintiff founded her case exclusively on an alleged contractual tenancy duly determined by the above-mentioned notice to quit. There was no alternative claim founded on a statutory tenancy under the Rent Restriction Acts, entitling the judge, without any such notice to quit, to order possession to be given to the plaintiff; nor was any application to amend the claim made at the hearing in the county court. On the action coming on for trial the point was taken that the alleged notice to quit was on the face of it invalid or ineffective. The learned county court judge so decided, with the result that the claim, as pleaded, failed in limine and was dismissed with costs. The ground of the learned judge's decision was that the insertion of the words "or before" in the phrase "notice to quit on "or before the 25th March" rendered an otherwise good notice uncertain and ambiguous and was, accordingly, fatal to its efficacy. In so holding, the learned judge was following, as we were informed, previous decisions of his own and of other county court judges.

The argument of the plaintiff before this court was two-fold.

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Her first contention was that upon its fair and reasonable construction the document of December 20, 1944, meant, and must have meant, that the landlord gave notice terminating the alleged tenancy on March 25, 1945, the words " or before " having only the effect of conferring upon the tenant an option of vacating the premises on an earlier date of his own choice and thereby terminating the tenancy on such earlier date. The second, and alternative, contention was that, even if the letter of December 20, 1944, was ineffective to determine a contractual tenancy, nevertheless the county court judge should (since the premises fell within the scope of the Rent Restriction Acts) have examined the available evidence in the case both written and oral; that, had he done so, he would or might have found that in truth the tenancy had before the date of the hearing ceased to be a contractual tenancy and had become a statutory tenancy; and that accordingly the invalidity of the notice of December 20, 1944, did not affect the plaintiff's right to possession. She asked, therefore, for a new trial on the ground that the county court judge was both entitled and bound to examine the available evidence notwithstanding the form of the plaintiff's points of claim and the absence of any application to amend in order to apply the criteria of para. (*h*) of the first schedule to the Act of 1933.

The first branch of the plaintiff's argument raises a question of general importance, namely, whether in the absence of some special context (and we do not think any special context is to be found in the present case) the use in a notice to quit of the disjunctive phrase " on or before " in relation to a fixed date invalidates the notice on the ground of uncertainty. It is well-established that a notice to quit, being a " unilateral " act " in exercise of a contractual right to put an end to an existing relation of landlord and tenant, must conform strictly to the legal requirements of the contract. Accordingly, " although no particular form need be followed, there must " be plain unambiguous words claiming to determine the " existing tenancy at a certain time " (see per Lord Coleridge C.J. in *Gardner* v. *Ingram* (1), quoted with approval by Atkin L.J. in *P. Phipps & Company* (*Northampton and Towcester Breweries*) *Limited* v. *Rogers* (2)). We refer also to the language of the present Master of the Rolls in the most recently reported case in regard to notices to quit to which our attention has been directed—*Hankey* v. *Clavering* (3): " That takes me

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(1) 61 L. T. 729, 730.
(2) [1925] 1 K. B. 14, 27.
(3) [1942] 2 K. B. 329, 330.

"back to the real point, namely, whether or not the notice "was good, in the sense that it had the effect of terminating "the lease on December 25, 1941. Notices of this kind are "documents of a technical nature, technical because they "are not consensual documents, but, if they are in proper "form they have of their own force without any assent by the "recipient the effect of bringing the demise to an end. They "must on their face and on a fair and reasonable construction "do what the lease provides that they are to do. It is "perfectly true that in construing such a document, as in "construing all documents, the court in a case of ambiguity "will lean in favour of reading the document in such a way "as to give it validity, but I dissent entirely from the proposi"tion that, where a document is clear and specific, but "inaccurate on some matter, such as that of date, it is possible "to ignore the inaccuracy and substitute the correct date or "other particular because it appears that the error was "inserted by a slip." There is a further general principle to be applied. The court must assume that the parties to the contract of tenancy are aware of its terms, particularly of the provisions relative to its termination: see, for example, per Atkin L.J. in *P. Phipps & Company* (*Northampton and Towcester Breweries*), *Limited* v. *Rogers* (1).

Bearing these general principles in mind, the question for our determination is solely one of interpretation. What upon its fair and reasonable construction does the document of December 20, 1944, mean? Is the tenant left by its terms in any doubt as to its intended effect? On the one hand, does the document, when correctly construed, contain a statement that the landlord intends to treat the relationship of landlord and tenant as determined upon some unspecified (and therefore uncertain) date between December 21, 1944 (the day following the date of the document) and March 25, 1945? Or does it contain an unequivocal statement to the tenant that on March 25, 1945, the rights and obligations of his tenancy, including his right to possession of the premises, will come to an end, at the same time giving to him an option to deliver up possession at some earlier date of his own choosing? And if some such option is given, is it one impliedly subject to the condition of the tenant's continuing under the obligations of the tenancy—such as payment of rent—till March 25, 1945? Or is it an option to bring the tenancy to an end for all purposes on the date when he in fact evacuates

(1) [1925] 1 K. B. 14, 27.

the premises? In short, is the true interpretation, " I give " you notice that the tenancy will end on the named date, but, " in case it suits you better to end it earlier, I here and now " make you an offer to end it at any earlier date you like upon " your accepting my offer "?—such offer being open to acceptance, presumably, by oral or written word or by conduct. In our judgment, and treating the matter as one of the construction of the document without reference to any authority, its true effect was, first, to give to the tenant an irrevocable notice to determine on March 25, 1945, and, second, to make to the tenant an offer to accept from him a determination of that relationship on any earlier date (of the tenant's choice) on which the tenant should give up in fact possession of the premises.

If the view we take of the construction of the material phrase is well-founded, it follows that a notice to quit " on or " before " a fixed date is prima facie valid and effective. Nor, as it seems to us, would the result be different if the option given to the tenant were not, as we think it is, to determine the tenancy by the vacating of the premises on some date earlier than that named in the notice, but were an option merely to give up possession at such earlier date without any corresponding right to treat his obligations as a tenant as thereby determined. In both cases the effect is that the landlord intimates his intention to treat the tenancy as coming to an end on the certain date named in the notice, giving to the tenant an opportunity of further altering his position at some earlier time if he elects so to do. As regards the option, the next step is with the tenant. So far as the landlord is concerned, he has stated his position and thereby taken the step of finally fixing the end of the tenancy. Whether he could thereafter withdraw his offer to accept from the tenant an earlier determination, we need not discuss. In this connexion it is to be borne in mind that, as pointed out during the argument, the notice to quit though in form only calling upon the tenant to do a particular act (namely, to vacate the premises) is beyond doubt intended upon its taking effect to put an end altogether to the relation of landlord and tenant. Though in terms such intention is not expressed, no one, we think, could for a moment be in doubt upon it. The intention must be read into the notice because that is its plain meaning. The tenant is called upon to " quit " on the named date simply because his right to remain will then have ceased. So read, the words " or before " necessarily import the offer: "But if you like to quit the premises on any day "before that, I here and now give you my consent." The alternative construction is to read the document as equivalent to a notice by the landlord that he intends to terminate the tenancy at some unspecified date not later (and perhaps earlier) than the date stated in the notice. So to construe it would import a claim of right to terminate on a shorter notice than the contract (arising by virtue of the quarterly option) would allow; and to construe the document as importing an intention to break the contract must be wrong if there is another equally natural meaning which imports no breach. The maxim ut res magis valeat quam pereat applies. A similar conclusion follows from the uncertainty which that construction must inevitably (but unnecessarily) create. Such a notice would leave the initiative entirely with the landlord, and the tenant could not on the face of it know at what date in fact the landlord proposed to regard the tenancy as determined and to evict him, save that it would not be later than the date specified in the notice. If that were the true meaning of the notice it would obviously be so uncertain as to be invalid. Such a notice must of necessity import that the landlord has not yet decided on the actual date for the termination of the tenancy and that he will have to take some further step and notify the tenant accordingly when his decision has been made. In other words, this alternative construction of the notice not only makes it bad for uncertainty, but also deprives it of that quality of finality which above all else a notice to quit must possess.

The use of the phrase "on or before" some fixed date is to-day by no means uncommon, particularly in covenants or demands for payment of money, and in such a context it cannot, in our judgment, be open to serious doubt that it means, and would be understood to mean, that the covenantor or debtor is under obligation to pay the debt on (but not earlier than) the date fixed but has the option of discharging it at any earlier time selected by him: see per Parker J. in *In re Tewkesbury Gas Company* (1). In our judgment that reasoning is equally applicable to a notice to quit and to a covenant or demand for the payment of money.

We turn now to the decided cases to which our attention has been drawn in the course of the argument. Three cases have been cited to us in which the phrase "on or before" has been judicially considered in reference to the termination of the relationship of landlord and tenant (all being cases before Divisional Courts), namely: *Gardner* v. *Ingram* (1); *Queen's Club Gardens Estates, Ld.* v. *Bignell* (2); *De Vries* v. *Sparks* (3). In the first and third of these cases the question before the court was the effect, not of a notice to quit served by a landlord on a tenant, but of a document addressed by a tenant to his landlord referring (in the one case) to an intention to surrender on the part of the tenant, and (in the other case) to an alleged agreement for surrender "on or before" a named date. In each case the decision of the court was based primarily on the ground that the document in suit was not a notice to quit but (in the former case) was an expression of an intention "to do something which could not be done "without the landlord's consent" and (in the latter case) amounted to an attempt to set up an agreement the existence of which was not established. But in the first case Bowen L.J. emphasized (4), in reference to the facts of the case, the general principle that a notice, if effective to determine a tenancy, "must be plain and unequivocal in its terms leaving "no doubt as to the intention of the party giving it"; and in the latter case Salter J. said (5) that if the document there in suit was to be regarded as a notice to quit, it was ineffective as not being expressed (by reason of the use of the phrase "on or before") to expire on a fixed date. In our judgment both these cases are distinguishable from the present. In both cases, as already stated, the documents relied on as determining the tenancy were held not to be notices to quit at all. But assuming that the documents in the two cases should be considered as notices to determine the respective tenancies, it will be observed that they were notices served by the tenants of proposed surrender on their part. They did not call on the respective landlords to do anything. They informed the landlords that "on or before" the relevant named dates the tenancies would be surrendered. The initiative rested with the parties giving the notices. The parties receiving the notices were in such circumstances left wholly uncertain of the dates on which in fact the tenants would take the initiative and claim that the tenancies were at an end. On principle, therefore, and for the reasons which we have already attempted to state, these cases cannot be cited as authorities applicable to a notice to quit given by a landlord to a tenant in which on the face of the document the initiative in selecting some date earlier than the date specified is left entirely with the party to whom the notice is addressed.

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(1) [1911] 2 Ch. 279, 284.

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(1) 61 L. T. 729.

(2) [1924] 1 K. B. 117.

(3) 137 L. T. 441.

(4) 61 L. T. 730.

(5) 137 L. T. 443.

The remaining case—*Queen's Club Gardens Estates, Ld.* v. *Bignell* (1)—is more directly in point. In that case the landlords purported to determine a tenancy by giving to the tenant " the requisite week's notice for the termination of your " tenancy one week from Monday next, on or before which " date they will require vacant possession." It is to be observed that in this case the notice distinguished in terms between the date fixed by the landlord for termination of the tenancy (namely, " one week from Monday next ") and the delivery up by the tenant of possession (which was left to be selected by the tenant on any date in the meantime). It was proved in fact that the tenancy was a weekly tenancy ending on the Saturday in each week, and the decision of the court (Lush and Salter JJ.) was to the effect that the notice to terminate, being expressed to refer to the wrong day of the week, was ineffective. Lush J., however, made the following observations (2): " I may say that I very greatly doubt " whether a notice to quit, assuming it to be free from " objection in other respects, can be said to be valid in which " the landlord mentions a specific date for the termination " of the tenancy and adds that " on or before " that date they " will require possession. A notice to quit must be certain " and definite, and I am by no means sure that a notice to " quit in that form is a certain and definite notice to quit on " on the day specified. It may be that it is a notice that the " landlord will require possession before that day, and, if so, " it seems obvious that it must be a bad notice to quit. That " view is, no doubt, somewhat technical, and it may be that " the more reasonable interpretation of the notice is to read " it as meaning merely that if the tenant likes to give up " possession before the day specified, the landlord is willing to " take it ; but I have great doubt whether it is right to put so " favourable an interpretation as that upon this notice to quit. " I am not going to rest my judgment upon these last words, " of the notice, but leave the question of their interpretation " without expressing any definite opinion with regard to it, " because in my view, apart altogether from these words,

(1) [1924] 1 K. B. 117. (2) [1924] 1 K. B. 122.

"this notice to quit is invalid." There is no doubt that Lush J., in the passage quoted, indicated that in his view the use of the phrase "on or before" in relation to the date specified for the termination of the tenancy rendered the notice to quit so doubtful in meaning and intention as to be invalid. With all respect to that learned judge, we are unable to share his opinion. In our judgment, the fair and reasonable construction of the notice to quit before him was that the landlords gave a final notice purporting in any event to terminate the contract of tenancy on the Monday week following the date of the notice, but gave at the same time to the tenant the option of quitting the premises on an earlier date chosen by him and thus of terminating the contract of tenancy on that earlier date. In so far as the above decisions express a different view from that now expressed by this court, they are in our judgment erroneous. But in the light of the decisions, and of the dicta to which we have referred, we think that the learned county court judge had no alternative to deciding as he did.

Before leaving the authorities we wish to refer to the earlier case in this court of *Ahearn* v. *Bellman* (1). In that case the landlord had given to his tenant notice to quit the premises in question "on or before May 1, 1878," but added a further notice to the effect that if the tenant continued in possession after May 1, 1878 an enhanced rent would be payable by him. The argument turned solely on the question whether the final provision wholly invalidated the notice to quit. The majority of the Court (Bramwell and Cotton L.JJ.), allowing the appeal, held that it did not. It is in our view significant that so far as can be observed from the report no point was taken either in the court below or in the argument before the Court of Appeal, or by Brett L.J. (who dissented from the majority of the Court of Appeal) on the use of the disjunctive phrase "on or before." Though the case cannot be regarded as an authority on the point now before us, it shows at least that to no one concerned in that case did the use of the phrase in itself suggest uncertainty or ambiguity.

The result is that in our judgment the county court judge was wrong in dismissing the action on the point of law arising on the form of the notice. The appeal must therefore be allowed and the case referred back to another county court judge (in accordance with our usual practice) for consideration

(1) (1879) 4 Ex. D. 201.

by him of all the other matters raised by the pleadings—including the question whether the tenancy of the defendant had, by exercise of the option, become determinable by a three months' notice at all; and although, if the tenancy had become quarterly, the notice to determine it was good, the learned judge will still have to exercise his discretion under s. 3, sub-s. 1, and para. (*h*) of the first schedule of the Act of 1933. The contention that the tenancy passed out of contract into status under the Rent Restriction Acts, by reason of the letter of March 19, 1943, is not open unless leave to amend the points of claim is asked for and granted by the new trial judge; and that would be an entirely new case. The judgment below must be set aside and the whole action re-heard before another judge. The plaintiff will have the costs of the appeal. The costs of the first trial will abide the event of the new trial.

Appeal allowed.

Solicitors for the appellant: *Hughes, Hooker & Co., for Gale & Gale, Poole.*

Solicitors for the respondent: *Barnes & Butler, for J. W. Miller & Son, Poole.*

H. A. P.

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Lord Greene M.R., du Parcq and Tucker L.JJ.

Master and servant—Employment to act at theatre—Rehearsal—Clothing stolen from dressing room—Negligence—No duty on master to protect servant's clothing from theft.

By a contract dated December 2, 1944, the plaintiff was employed by the defendant to act the dame in a pantomime for three weeks certain from December 25, 1944. Provision was made for a week of rehearsals at any place selected by the defendant. The rehearsals took place at a theatre and on the second day the plaintiff had stolen from his dressing room his overcoat, as well as two shawls and a pair of shoes, forming part of his theatrical equipment. In proceedings by the plaintiff for damages the county court judge found that the defendant had been negligent in failing to provide a lock on the dressing room door and in having no one at the stage door during the morning of the particular day to prevent the entry of unauthorized persons; but he held that the defendant was not under a duty to protect the clothing from theft:—

Held (affirming the county court judge) that there was no duty on the defendant to take reasonable care to protect the plaintiff's clothing from theft. Such an obligation was not an implied term of the contract, nor was there any liability on a master to provide such a system of work as would protect his servant's clothing from theft. No such tort as was alleged was known to the law.

APPEAL from Westminster county court.

The plaintiff, Joseph Deyong, who was a variety artiste, was, by an agreement set out in a letter dated December 2, 1944, employed by the defendant, a theatrical producer, to play the dame or any similar part in a pantomime at the Palace Theatre, Camberwell, commencing from December 25, 1944, at a salary of 45*l.* a week for three weeks certain with an option to extend the engagement. The letter contained the following provision : " The management reserves the right to " produce and present any pantomime they wish and the " management reserves the right to transfer the pantomime " to any theatre in their circuit or any other theatre but under " the same terms and conditions." There was a provision for rehearsal for a week free of salary at a place to be decided on by the management. The rehearsals took place at the Palace theatre and on the second day the plaintiff had his overcoat, as well as two shawls and a pair of shoes, part of his theatrical equipment, stolen from the dressing room which he shared with another actor.

The plaintiff claimed 26*l.* 14*s.* 0*d.* damages against the defendant for the theft of the articles through his negligence. The evidence showed that there was no proper lock and key to the dressing room, although the plaintiff had asked for it, and that the person employed on the stage door to prevent unauthorized persons from entering was absent unwell on the day in question and was not replaced by anyone until 2 p.m.

The county court judge found these to be acts of negligence on the part of the defendant, but that the defendant was under no duty under the contract, or otherwise, to take reasonable steps to protect the plaintiff's clothing from theft. The plaintiff appealed.

Gilbert Beyfus K.C. and *T. Elder Jones* for the plaintiff. The duty resting on a master to use every care to provide a safe system of working to protect his servant from injury applies also as regards the protection of his property, so far as it is

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needed to enable him to do his work. The county court judge has found that the defendant committed two acts of negligence, so that the only question is whether the defendant had a duty to protect the plaintiff's clothing. The court has always implied as a term of the contract of service that reasonable steps shall be taken to protect the workman from injury and this applies also to his belongings: see *Wilsons & Clyde Coal Co.* v. *English* (1). The obligation cannot, it is true, be based on an implied term of the contract, unless it can be said that if mentioned at the time of the entry into the contract, it would have been said that the obligation was understood. It is contended that that is so. Alternatively, the employer is liable in tort at common law: see *Edwards* v. *Mallan* (2). In *Donoghue* v. *Stevenson* (3) the House of Lords approved the proposition of law as laid down in *Heaven* v. *Pender* (4), namely, that there was an implied duty on an employer to take reasonable care to protect the person and property of the employee from danger or injury during his employment. This applies equally to a case where the employment is without danger.

[LORD GREENE M.R. The duty must depend on the nature of the risk and the county court judge has held that the theft of clothing required a skilled and audacious thief.]

It is not suggested that the duty is more than to take reasonable care and the county court judge has held that there was negligence in two respects. The duty was not to protect clothing from thieves, but to take reasonable care. In all the cases there is rather a mixing up of the principles on which liability for negligence is based, namely, liability at common law and liability arising from an implied term of the contract of employment: see per Lord Wright in *Wilsons & Clyde Coal Co.* v. *English* (5). On either view it is the employer's duty to take reasonable care.

Levy K.C. and *Levine* for the defendant. Counsel for the plaintiff are in doubt whether to base the plaintiff's claim for damages on implied contract or tort. But the only possible claim is on implied contract. The plaintiff has ceased to set up the relationship of bailor and bailee and in the many cases arising out of the relationship of master and servant the claim is in tort: see *Wilsons & Clyde Coal Co.* v. *English* (1). There is no reference in that case to the pleadings except to say that damages are claimed at common law, that is, in tort. If it were not so the defence of contributory negligence could not be set up. The tort arises out of the obligation to protect the servant from injury. It has never been laid down that an obligation arising out of the relationship of master and servant is to protect a servant's belongings. That obligation only arises when the master constitutes himself a bailee.

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(1) [1938] A. C. 57.
(2) [1908] 1 K. B. 1002.
(3) [1932] A. C. 562.
(4) (1883) 11 Q. B. D. 503, 509.
(5) [1938] A. C. 81.

[LORD GREENE M.R. *In Wilsons & Clyde Coal Co.* v. *English* (1) Lord Wright in one passage seems to base the case on contract.]

The whole tenor of his judgment is in the other direction. There is no recognized tort such as the plaintiff seeks to establish. Further there can be no possible ground for setting up implied contract to protect the employee's clothing from theft by third parties.

Beyfus K.C. replied.

LORD GREENE M.R.: du Parcq L.J. will deliver the first judgment.

DU PARCQ L.J.: This is an appeal from a decision of His Honour Judge Davies at the Westminster county court. The claim was made by the plaintiff who is an actor. His claim as pleaded was based on three grounds. First it was said that it was an implied term of the contract, that the defendant should use all reasonable care in the safeguarding of the plaintiff's clothing. Then it was said, as an alternative plea, that it was necessary for the plaintiff to leave his clothing and other goods on the defendant's premises so that the defendant became bailee of the clothing and goods and, further that the defendant was under a duty towards the plaintiff to use all reasonable care in the safeguarding of the clothing and goods. The learned judge has found that reasonable care was not taken by the defendant. There was at part of the material time no one present to look after the stage door, and no satisfactory lock on the door of the dressing room. There was some preparation made in the way of screw eyes for putting in a padlock, and it was said that sometimes actors preferred to provide padlocks of their own. There was a Yale lock on the door, but unfortunately it was so ineffective that any pressure against the door would open it, and there was some

(1) [1938] A. C. 78.

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other lock, I think, which did not work. Altogether it is true to say that there were no means by which the door could be effectively locked. The plaintiff shared the dressing room with another actor, and it might have been very inconvenient, in the circumstances, if the door had had to be frequently locked and unlocked as they left or returned to the dressing room. That, however, is not a point that need be further considered. The learned judge has found that the defendant did not take reasonable care for the safety of the goods of the plaintiff, and having found this on the facts in a judgment which is of the greatest assistance to us, considered the law and came to the conclusion that there was no duty of the nature pleaded on the defendant at all. It is against that finding of law that the plaintiff now appeals.

The learned judge held, and it was not disputed, that the contract was one of service. He went on to say that the authorities, in his view, made it plain that there was no implied obligation on a master to take care for the safety of his servants, except in relation to certain matters which are specified in the decisions or may be prescribed under statute or by custom. He referred to some observations of Bankes L.J. in *Cole* v. *De Trafford* (*No.* 2) (1), and pointed out that there was no hint in the text-books of any such obligation as was here alleged. He also held that there was no ground for implying such a term as the plaintiff, in the course of the argument before him, sought to imply in the contract as being necessary in order to give business efficacy to it. We have had an interesting argument on this topic, which is undoubtedly one of some importance, and I have come to the conclusion that the learned judge's judgment was right and that the plaintiff has not established any claim which can be recognized according to the law of this country. One matter may be cleared out of the way at once. The allegation of a bailment was abandoned very early; it was abandoned before the learned judge and now nobody suggests that the defendant was a bailee.

Mr. Beyfus began his argument by relying on the well-known proposition that there is an obligation on an employer to take reasonable care to provide, among other things, a proper system of working. That, no doubt, is correct, but it must be understood with due regard to the decisions and to the subject-matter of those decisions. There are many cases in which the matter is dealt with and I do not propose to go through them. Some were referred to in argument. There is, I think, a convenient summary of the law in the speech of Lord Maugham in *Wilsons & Clyde Coal Co.* v. *English* (1). The House was there dealing with a case of personal injury, and Lord Maugham says first that an employer is responsible to an employee for an accident caused by the negligence of another employee, secondly, he deals with the well-known limitation on that proposition resting on the doctrine of common employment, and, thirdly, he says that in the case of employments involving risk the rule as to common employment only applies when the maxim volenti non fit injuria can fairly be invoked. " In such employments "—that is employments involving risk—" it was held that there was a duty on " the employer "—I leave out the first two duties—" to " provide a proper system of working." Mr. Beyfus's argument is, as I have said, based on an employer's obligation to provide a proper system of working. I think he would concede, and I think it must be conceded, having regard to the authorities, that this obligation exists in order to secure the personal safety of the workman. Then Mr. Beyfus said that if through a breach of the obligation to provide a proper system of working the workman not only receives personal injury but suffers damage to his clothing, he will be entitled, and no doubt has often been held to be entitled, to damages in respect of the damage to his clothing. Therefore, he said, it is plain that the master has a duty of some kind in respect of the clothing. He must prevent it from being damaged, and if he must prevent it from being damaged, it is a legitimate, if not a necessary, extension of the principle of the decisions to say that he must take reasonable steps also to prevent it from being lost or taken away by the felonious act of some other person. That is a specious argument, but in my opinion it is quite unsound. It may well be, though I do not so decide, that if through a breach of the duty to provide a proper system of working a workman is not only injured in his person but also suffers damage to his clothing, the damage to the clothing can properly be included in the damages. If through such a breach his clothes are torn off his back and he suffers no personal injury, he may be entitled to recover damages, but it does not in the least follow that there is a duty on the employer of quite a different nature to take steps to safe-

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(1) [1918] 2 K. B. 523.

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(1) [1938] A. C. 57, 86.

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guard the workman while in his employ against loss through the wrongful act of a third person. That conclusion does not in the least follow, and it cannot be made to follow by any process of reasoning that is not plainly fallacious. That line of argument, in my judgment, does not assist Mr. Beyfus at all.

Where then do we get the obligation ? There is no bailment and the case does not fall under the general proposition to which I have referred. It is said that this is a case of tort, and we were reminded of observations which are very familiar to lawyers in *Heaven* v. *Pender* (1) and *Donoghue* v. *Stevenson* (2). I do not think I need cite them in terms. There are well-known words of Lord Atkin in *Donoghue* v. *Stevenson* (2) as to the duty towards one's neighbour and the method of ascertaining who is one's neighbour (3). It has been pointed out (and this only shows the difficulty of stating a general proposition which is not too wide) that unless one somewhat narrows the term of the proposition as it has been stated, one would be including in it something which the law does not support. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is much too wide. There has to be a breach of a duty which the law recognizes, and to ascertain what the law recognizes regard must be had to the decisions of the courts. There has never been a decision that a master must, merely because of the relationship which exists between master and servant, take reasonable care for the safety of his servant's belongings in the sense that he must take steps to ensure, so far as he can, that no wicked person shall have an opportunity of stealing the servant's goods. That is the duty contended for here, and there is not a shred of authority to suggest that any such duty exists or ever has existed. Probably decisions on the point would be most likely to be found in cases between a domestic servant and his or her master. Nobody has ever suggested, and in my opinion it is clearly not the law, that if the master of the house leaves the house unattended and empty, or if he forgets to shut a window at night or properly to secure it, or if the locks on the

Bad grammar

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(1) 11 Q. B. D. 503.
(2) [1932] A. C. 562.
(3) Ibid. 580.

door have ceased to be secure, and by reason of his lack of care a housebreaker enters and steals, among other things, the goods of a domestic servant living in the house, then the master is liable to his servant for negligence. Certainly if regard be had to older cases, such as *Priestley* v. *Fowler* (1), it is plain that the courts would then have thought such a claim to border on the ridiculous, and in my judgment the law on this particular matter is no different to-day.

There are many obligations which necessarily arise from the relationship of master and servant and, so far as personal safety goes, they are now, I think, pretty clearly defined. So far as the principle of the safe system of working is concerned the latest decision in the House of Lords (2) has told us—and again I need not cite the actual words of it as they are so familiar—that the principle has been extended as far as it properly can be. There is no support to be found anywhere for the proposition that the relationship of master and servant of itself imports any such duty as is here suggested.

Can the claim be put in any other way? I entirely agree with the learned county court judge that if one looks at this contract it would be impossible to say that such a term was implied in it. The theft took place during rehearsals. The only thing said about rehearsals in the contract is that the rehearsals are to take place at any place decided on by the management. No doubt places might be found by the management in which an actor might refuse to rehearse. Of course the place chosen must be a reasonable place. Apart from rehearsals, when it comes to the performance of the pantomime it may take place not only at any theatre on the circuit of the management (that I presume would refer to circuits over which the defendant would have that degree of control which a lessee at any rate has) but at any other theatre, that is, I suppose, any theatre in the United Kingdom. This term might well include theatres of which the defendant was not the lessee, where he merely went with his company to act and where, as the plaintiff would know, he could have very little control over the arrangements as to dressing rooms, and so forth. It was said by Mr. Beyfus that clearly a dressing room must be provided. There I agree. Certainly a dressing room is necessary during performances, because the actor who is playing the dame could not be expected to wear the appropriate oriental costume in the pantomime Aladdin without a place in which he could dress himself. No doubt it must be a dressing room reasonably suitable for the purpose, though I dare say dressing rooms in different theatres vary very much. It does not follow from that that it is upon the defendant to see that every reasonable step is taken to prevent a thief from entering the dressing room. There were in this particular case many people behind the scenes, some of them not actors at all, some of them workmen from outside, some of them described by a police witness as being what he called casual persons, and obviously it would be a very serious obligation to have to take steps which would really effectively prevent the danger of theft. Many people might legitimately pass the stage doorkeeper who might still not be beyond suspicion. It is unnecessary, however, to consider how onerous the duty would be if indeed the duty does not exist, and I think it does not. It certainly cannot be implied in this contract.

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(1) (1837) 3 M. & W. 1.

(2) *Colfar* v. *Coggins & Griffith (Liverpool), Ld.* [1945] A. C. 197, 202.

The defendant's omission to guard against theft was not, in my opinion, for the reasons I have given, a tort for which an action can be brought. Failure to provide against theft of the servant's goods is not a breach of any general obligation. No contractual liability exists. I think that I have exhausted all the possibilities on which Mr. Beyfus sought to rely. Something was said by Mr. Levy for the defendant as to the learned judge's findings that a thief had come in from outside. It is unnecessary to deal with that, because assuming that to have been a definite finding —and I am not at all sure that it was—it is unnecessary in the circumstances to consider whether the evidence supported it or not. I think that the legal submissions of the plaintiff all fail; and in my judgment this appeal should be dismissed with costs.

TUCKER L.J.: I agree. This case raises the question whether the defendant was under any duty to the plaintiff to take reasonable steps to protect the property of the plaintiff from theft. I think it important to emphasize in this case first of all that the relationship of the parties was regulated by an agreement in writing dated December 2, 1944. It is quite impossible to imply any additional term into that agreement, imposing any duty on the defendant directly to take such care. The plaintiff must therefore look elsewhere for the foundation of the liability of the defendant, if it exists.

Eventually Mr. Beyfus founded himself on the proposition that the duty was a common law duty to provide a proper system of working, which he says applies not only to the physical safety of the workman but also to the safeguarding of his property. I suppose there is no relationship which has been considered in courts of law more often than that of master and servant, and nowhere in the whole course of the law is any authority for such a proposition forthcoming.

There are one or two facts which I think deserve to be emphasized in this case. The learned county court judge draws the inference with regard to the property which was stolen that the thief came in from outside and stole the property, but I agree that that finding was not perhaps essential to his decision. The property which was stolen consisted of the plaintiff's overcoat, which was not a necessary adjunct to the fulfilment of the part of the Widow Twankey which he was going to play in the pantomime, and two shawls and a pair of shoes, which were garments and footwear appropriate to the part of Widow Twankey and reasonably brought to the theatre in case they were needed. But there was no evidence that he was under any obligation to produce this clothing and footwear at the theatre on this particular day, and in fact the rehearsals which were going on do not appear to have been dress rehearsals. I mention that to distinguish this case from any other which may some day arise where a workman suffers damage to or the loss of the tools of his trade which he may be under an obligation to bring and use at his work. The learned county court judge came to the conclusion that there was no such duty owed in law, and I agree with the decision at which he arrived.

The class of obligation which Mr. Beyfus relied on is that which was finally expounded in the House of Lords in *Wilsons & Clyde Coal Co.* v. *English* (1), and I may refer to the often quoted language of Lord Wright, where he says (2): " The obligation is threefold—' the provision of a competent " ' staff of men, adequate material, and a proper system and " ' effective supervision '." Then he goes on (3): " I think the " whole course of authority consistently recognizes a duty " which rests on the employer and which is personal to the " employer, to take reasonable care for the safety of his " workmen, whether the employer be an individual, a firm, or

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(1) [1938] A. C. 57.
(2) Ibid. 78.
(3) Ibid. 84.

"a company, and whether or not the employer takes any "share in the conduct of the operations. The obligation is "threefold, as I have explained. Thus the obligation to "provide and maintain proper plant and appliances is a "continuing obligation. It is not, however, broken by "a mere misuse or failure to use proper plant and appliances "due to the negligence of a fellow servant or a merely "temporary failure to keep in order or adjust plant and "appliances or a casual departure from the system of "working." There is no hint in that case, or in any other case, that the proper system of working includes the proper provision of safeguards protecting the workmen's property from theft. It is to be observed, that in the section of Halsbury's Laws of England, 2nd ed., vol. XXII, p. 174, which deals with the duty of the master to the servant there are four separate headings. One is the physical well-being of the servant dealing with the duty or extent of the duty of the master to his domestic servant or apprentice. The second division is safety of the employment. The third division is the character of the servant and the fourth is the duty to indemnify the servant. Under none of those headings is there to be found any suggestion of a duty that is owed by the master to his servant, merely by reason of that relationship, to safeguard the property of the servant which the servant for his own convenience brings on the premises of his master. I think that is really sufficient to dispose of this case, but I desire to add, so far as I am concerned, that our decision in this case does not mean that under no circumstances is a master ever under any liability with regard to the property of his servant. He may be under such a liability where it arises out of the day to day relationship of one man to another and not of the relationship solely of master and servant. If a man knowing that his servants have placed their property at a certain place at his works, bicycles or clothing or what not, gives to one of his servants an order which in being carried out will be likely to damage or imperil the safety of the servants' goods, he may well be liable, not by reason of the relationship of master and servant but by reason of the fact that he is to that extent the servant's neighbour. He may owe a duty to his servant with regard to his servant's property very similar to that which is owed by one user of the highway to another. I agree that this appeal fails and should be dismissed.

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LORD GREENE M.R.: I entirely agree and do not wish to add anything.

Appeal dismissed.

Solicitors: *Clare & Clare; Hart-Leverton & Co.*

H. C. G.

C. A.
1946
Jan. 18.
Scott, MacKinnon and Morton L.JJ.

NEALE *v.* JENNINGS.

Ecclesiastical law—Landlord and tenant—Rector—Large rectory—Tenant of cottage in grounds of rectory—Action for possession of cottage required for rector's servants—Rent restrictions—Building not "necessary for convenient occupation" of rectory—Construction of word "necessary"—Pluralities Act, 1838 (1 *&* 2 *Vict. c.* 106), *s.* 59.

The plaintiff, a rector, who was a bachelor, resided with two families of paying guests—seven persons in all—in his rectory, a large building consisting of twenty-two rooms, nineteen of which were furnished. The defendant was the tenant of a cottage in the grounds of, and appurtenant to, the rectory, belonging to the benefice. The plaintiff gave the defendant notice to quit the cottage, sued for possession, and at the hearing gave evidence that he required the cottage for its occupation by a married couple he had engaged to serve him, the husband as a gardener handyman and his wife for house-work at the rectory. The county court judge found that the cottage was not "necessary for the convenient "occupation of the rectory" within the meaning of s. 59 of the Pluralities Act, 1838, since the married couple could be quite conveniently housed at the rectory. The cottage, therefore, was subject to the Rent Restrictions Acts:—

Held, that the finding of the county court judge, who had not misdirected himself on the meaning of s. 59, was one of fact and conclusive. The words in s. 59 "necessary for the convenient "occupation of the same"—the house of residence—must be considered in relation to the particular circumstances of the present time and of the rectory or vicarage under consideration.

Observations by Morton L.J. on his judgment in *Culverwell* v. *Larcombe* (1945) 61 T. L. R. 385.

APPEAL from the Appleby county court.

The plaintiff, Arthur Wallace Neale, a bachelor, had been rector of Long Morton, Westmorland, since 1938, and resided at the rectory, which was a large house consisting of twenty-two rooms including one bathroom and two kitchens. Nineteen of the rooms were furnished. Shortly after the outbreak of war the rector received four families of

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evacuees, numbering twelve persons at the rectory. These left, and they were succeeded by the staff and executive committee of an industrial firm numbering about twelve persons, whom the rector received for profit. These, in turn, were succeeded by an officer and his wife with their two children and another married couple as paying guests, numbering with the rector, seven persons who were resident at the rectory at all material times in 1945. The defendant Walter Jennings was the weekly tenant of a cottage, known as the Rectory Cottage, twenty yards from, in the grounds (three and a-half acres) of, and appurtenant to the rectory, and belonging to the benefice. The defendant had resided at the cottage for forty years, succeeding his father in the tenancy seventeen years ago. He occupied the cottage with his wife, their three children and a brother-in-law of his wife.

On July 4, 1945, the plaintiff gave the defendant notice to quit the cottage on or before July 14, 1945, stating that the premises were required for the convenient occupation of the rectory and, the defendant continuing his occupation of the cottage, on August 18, 1945, the plaintiff brought an action in the Appleby county court claiming possession of the cottage. At the hearing the plaintiff gave evidence that he had engaged a man and his wife, the former as a gardener handyman and the latter for housework at the rectory, and that he required possession of the cottage for its occupation by this married couple.

The county court judge found that Rectory Cottage was not " necessary " for the convenient occupation of the rectory within the meaning of s. 59 of the Pluralities Act, 1838 (1) since the gardener handyman and his wife could be quite conveniently housed in the rectory and, accordingly, held that the cottage was not subject to the special legislation of the Pluralities Act, 1838, and, therefore, the defendant was protected by the Rent Restrictions Acts. Since it had not been shown that alternative accommodation was available nor any ground for possession by the plaintiff established under s. 3 of and sch. 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, he gave judgment for the defendant. The plaintiff appealed.

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(1) By s. 59 of the Pluralities Act, 1838 (1 & 2 Vict. c. 106) :—" Any agreement made for the " letting of the house of residence " or the buildings, gardens, " orchards or appurtenances " necessary for the convenient " occupation of the same, belong- " ing to any benefice, to which " house of residence any spiritual " person may be required, by " order of the bishop as aforesaid, " to proceed and to reside therein " . . . . shall be made in writing " and shall contain a condition for " avoiding the same, upon a copy " of such order . . . . being served " upon the occupier thereof . . . . " and otherwise shall be null and " void . . . . "

P. Malcolm Wright for plaintiff. The county court judge in arriving at his finding that this cottage was not necessary for the convenient occupation of the rectory, within the meaning of s. 59 of the Pluralities Act, 1838, misdirected himself. The cottage which was in the curtilage of and twenty yards from the rectory was a part of the rectory. It was known as "Rectory Cottage." Stirling L.J. said in *In re The Alms Corn Charity. Charity Commissioners* v. *Bode and Another* (1) "By the parsonage is meant the endow-"ments of the benefice. It is thus defined in Dogge's Parsons' "Counsellor (ed. 1703), 190 :—'A parsonage, or rectory, is "'a certain portion of land tythes and offerings, established "'by the laws of this kingdom, for the maintenance of the "'minister that hath the cure of souls within the parish where "'he is rector.'" [Morton L.J. But the county court judge was interpreting s. 59 of the Pluralities Act, 1838, and that section deals with the "house of residence" and also with "the buildings, gardens, orchards or appurtenances "necessary for the convenient occupation" of the house of residence belonging to any benefice. This special legislation does not affect a building not necessary for the convenient occupation of the house of residence.] *In Culverwell* v. *Larcombe* (2) this very question arose about a cottage in the grounds of a vicarage. Lawrence L.J. said in that case: "A parsonage comprises more than the actual house in which "the parson resides." The cottage forming part of the rectory, the Rent Restrictions Acts do not apply to it: *Bishop of Gloucester* v. *Cunnington* (3) and *Brandon* v. *Grundy* (4). Secondly, the county court judge has misdirected himself in deciding the case by considering the position of this particular rector who is a bachelor whose rectory possesses twenty-two rooms. The issue whether the building is necessary for the convenient occupation of a parsonage house cannot be decided by the indiosyncrasies of the rector for the moment in occupation. A tennis lawn or a garage cannot be unnecessary

(1) [1901] 2 Ch. 758.
(2) (1945) 61 T. L. R. 385.
(3) [1943] K. B. 101.
(4) [1943] 2 All E. R. 208.

for the convenient occupation of a parsonage house, because its present incumbent does not play tennis or does not drive or keep a motor-car. The next incumbent of the rectory at Long Marton may be a man with an unusually large family. If with every change of rector a building may become affected by the legislation of the Rent Restrictions Acts or that of the Pluralities Act, 1838, landlord and tenant will find it difficult to ascertain their position in law. [Morton L.J. Do you say that if a building is necessary for the convenient occupation of a parsonage house in 1838, when incumbents were in a position to afford and exercise more hospitality, it is so necessary in 1945 ?] No: the position has to be considered as it is to-day, but not with regard to a particular rector, but with regard to a particular rectory with the use any incumbent may make of it in the exercise of his spiritual duties or social activities. The question is whether the building is necessary for the convenient occupation of the rectory by a holder of this office. Of this issue the rector should be the best judge. The county court judge treated the case as if the issue was one of "greater hardship" under the Rent Restrictions Acts.

Glanfield for defendant was not called on.

SCOTT L.J. The question raised in this case is whether the Rent Restrictions Acts apply to a cottage in the grounds of the rectory at Long Marton, Westmorland. That question turns on the principle laid down by a considered judgment of this court in *The Bishop of Gloucester* v. *Cunnington* (1) that the legislation about rectories and vicarages contained in s. 59 of the Pluralities Act, 1838, was special legislation, and that, therefore, those parsonage houses were not affected by the general legislation of the Rent Restrictions Acts. The decision was that in the case of a rectory, to which that section applies, the Rent Restrictions Acts were not applicable. The question in the present case is whether this cottage in the grounds of a rectory came within that principle, in that it was within the words used in s. 59 a building "necessary for "the convenient occupation" of the rectory. If it was such a building it was subject to the special legislation contained in the Pluralities Act, 1838: if it was not such a building, the Rent Restrictions Acts applied to it.

In my view, the question, whether the cottage was or was not so necessary was one of fact for the county court judge and

(1) [1943] K. B. 101.

he has found it in favour of the tenant. Prima facie that finding was conclusive and this court cannot interfere with it unless the county court judge has misdirected himself on the meaning of s. 59. Counsel for the rector has urged on us that the reason given by the county court judge for his decision shows that he was misinterpreting s. 59. It was that in the circumstances of the case the cottage was not necessary for the convenient occupation of the rectory, since the rector could quite easily have used rooms in the rectory for the purpose of housing the married couple he had employed. The rectory was a very large building containing twenty-two rooms, of which nineteen were furnished; and the county court judge thought that in so large a house, it was not possible to say that the inconvenience of having the couple in the house was such as to compel him to hold that the cottage was necessary for the convenient occupation by the rector of his parsonage house. In taking that view I do not think that he was in any way misdirecting himself.

I will only add that when the Pluralities Act, 1838, was passed most parsonage houses were very large buildings, as indeed some still are; and at that time the incumbent was expected to exercise much hospitality and often had many persons staying with him in his house of residence. Tempora mutantur. To-day these large buildings, not being required for the exercise of lavish hospitality, are not convenient for their purpose and, indeed, owing to the altered financial position of most incumbents, constitute a great burden on them. This aspect cannot be forgotten in construing the words "buildings . . . . necessary for the convenient occupation" of the house of residence in s. 59 of the Pluralities Act, 1838. In my opinion the word "necessary" in that section must be construed in relation to the particular circumstances of the present time and of the particular rectory or vicarage under consideration. The appeal must be dismissed.

MacKinnon L.J. I agree. In the *Bishop of Gloucester* v. *Cunnington* (1) and in *Brandon* v. *Grundy* (2) there were claims in each case to recover possession of parsonage houses—houses of residence of incumbents, belonging to an ecclesiastical benefice. In each case the tenant relied on the Rent Restrictions Acts. By s. 32 of the Pluralities Act, 1838, every spiritual

(1) [1943] K. B 101. (2) [1943] 2 All E. R. 208.

person holding any benefice shall keep residence on the benefice and in the house of residence of the benefice and the section inflicts penalties on any such person who fails to do so without a licence and s. 59 provides that any agreement for letting a parsonage house to which an incumbent may be ordered by the bishop to proceed and reside therein is to contain a condition for avoiding the same upon a copy of the order being served upon the occupier or left at his house, and otherwise shall be null and void. It was held in these cases that this special legislation of the Pluralities Act, 1838, being applicable to parsonage houses, the Rent Restrictions Acts did not apply to them. In the case before the court we are not concerned with the tenancy of a parsonage house, but with that of a cottage in the three and a-half acres of the grounds of the rectory belonging to a benefice. The cottage might just as well have been in the rectory glebe on the other side of the road and the cottage is only subject to the provisions of the Pluralities Act, 1838, and so not affected by the Rent Restrictions Acts, if it is a building necessary for the convenient occupation of the parsonage house, within the meaning of s. 59 of the Pluralities Act, 1838. That question whether the cottage is such a building the county court judge has answered in the negative, a finding in favour of the tenant and it is clear that there was evidence on which he could so find. In *Culverwell* v. *Larcombe* (1) the very same question arose about a cottage in the grounds of the vicarage at Hinton Admiral. In that case the county court judge found that the cottage was necessary for the convenient occupation of the parsonage house and there being evidence to support that finding the court refused to interfere. The appeal must be dismissed.

MORTON L.J. I agree and will only add a comment on my judgment in *Culverwell* v. *Larcombe* (1), because that judgment, as it is set out in the very short report in the Times Law Reports may give rise to some misconception. In that case also, there was a cottage in the grounds of, and twenty yards away from, a vicarage, of which the vicar sued for possession. What I intended to say, though I may not have expressed it with sufficient clarity, was as follows:—" I have felt some " doubt during the argument, but I am now satisfied that " this cottage is not a dwelling-house to which the Rent

(1) 61 T. L. R. 385.

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"Restrictions Acts apply. The county court judge has "found as a fact that the cottage is necessary for the "convenient occupation of the house of residence—the "vicarage. That being so, the cottage is a building which "comes within s. 59 of the Pluralities Act, 1838. The result "is that it does not come within the Rent Restrictions Acts. "See the *Bishop of Gloucester* v. *Cunnington*" (1). I should be glad if what I have just said were treated in future as being my judgment in *Culverwell* v. *Larcombe* (2).

Appeal dismissed.

Solicitors for plaintiff: *Beachcroft & Co. for W. Scorer, Appleby.*

Solicitors for defendant: *Bell, Brodrick & Co., for Hewitson and Harker, Kirkby Stephen.*

(1) [1943] K. B. 101, 105. (2) 61 T. L. R. 385.

C. G. M.

SOMERSHIELD *v.* ROBIN.

C. A.
1946
Jan. 16, 17.
Lord Greene M.R., du Parcq and Tucker L.JJ.

County court—Jurisdiction—Landlord and tenant—Action for possession—Furnished house—Rent exceeding 100*l.—Apportionment—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 48, *sub-s.* 1.

The County Courts Act, 1934, s. 48, sub-s. 1, provides: "A "county court shall have jurisdiction to hear and determine any "action for the recovery of land where neither the value of the "land in question nor the rent payable in respect thereof exceeds "the sum of 100*l.* by the year":—

Held, that the rent agreed between landlord and tenant is the rent "payable in respect of the land" even where premises are let furnished. No deduction can be made of the annual sum attributable to the use of the furniture or to the rates being paid by the landlord so as to reduce the rent "payable in respect of" the land to 100*l.* or less.

APPEAL from Altrincham county court

The plaintiff, Oscar T. Somershield, was the owner of Halden, 31, Parkway, Wilmslow, which he let to the defendant Maurice H. Robin on a monthly tenancy at the monthly rent of 22*l.* 15*s.* or 273*l.* a year. The plaintiff gave a notice in writing dated July 25, 1945, determining the tenancy on August 31, 1945. The defendant having failed to give up possession, the plaintiff, on September 4, 1945, commenced proceedings in the county court for possession and mesne profits from September 1, 1945. The defendant set up the defence that as the annual rent was 273*l.* the proceedings were not within the jurisdiction of the county court having regard to s. 48, sub-s. 1, of the County Courts Act, 1934. The house was let furnished and the plaintiff paid the rates of 31*l.* and the water rate of 4*l.* 13*s.* a year and also a chief rent of 10*l.* For the plaintiff evidence was given by the valuer and estate agent who let the house that it was well furnished and that he allocated for the use of the furniture 150*l.* a year which, with the rates and water rate, made 185*l.* 13*s.* He estimated the reasonable rental of the house unfurnished at 78*l.* per annum. The county court judge said that for the defendant it was contended that the only thing to consider was the actual rent paid by the tenant. He did not accept this. The words " rent payable " were qualified by the words " in respect of the land." He had then to ascertain which part of the rent paid related to the land in question and what part related to the use of the furniture and the rates. He accepted the evidence that the rent payable must be reduced by 150*l.* for the use of the furniture and by the amount of the rates. He also accepted the evidence that the value of the premises was 78*l.* a year unfurnished. There was jurisdiction to hear the case. He ordered the defendant to give up possession on November 14, 1945, and to pay the sum of 35*l.* 14*s.* 6*d.* for rent and mesne profits. The defendant appealed.

Honeyman for the defendant. It is the rent agreed as between the landlord and tenant to which regard must be had : *Brown* v. *Cocking* (1). Then what is meant by " rent payable " in respect of the land " under s. 48, sub-s. 1, of the County Courts Act, 1934 ? It means rent in the ordinary sense of the word, that is, rent which would support a distress : see Foa on Landlord and Tenant, 6th ed., pp. 123, 537, *Newman* v. *Anderton* (2) and *Mackworth* v. *Hellard* (3). [He also referred to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2, proviso (i) and sub. s. 7.]

Value and rent are independent criteria under s. 48 ; the

(1) (1868) L. R. 3 Q B. 672.

(2) (1806) 2 Bos. & P. (N.R.) 224.

(3) [1921] 2 K.B. 755.

former is a fluctuating thing to be determined by the judge on the evidence, but rent is the fixed amount agreed on between the parties. It may have no relation to value and the fact that the rent is arrived at by taking into account that the tenant has the use of furniture is immaterial. The rent is one rent and it cannot be apportioned.

Redmond Barry K.C. and *Abdela* for the plaintiff. *Brown* v. *Cocking* (1) and *Mackworth* v. *Hellard* (2) established that in the ordinary case rent means the rent as between the parties and *Roussou* v. *Photi* (3) that when the rent for the occupation of premises is a single sum, that is the rent agreed regardless of how it is applied in the hands of the landlord. But rent in s. 48 of the Act of 1934 ought to be construed as it is in the Rent Restrictions Acts; and the first proviso to s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, omits from the application of the Act premises let furnished and s. 10 of the Rent and Mortgage Interest Restrictions Act, 1923, provides that a house is only to be treated as let at a rent which includes payment for the use of furniture when the payment for its use is a substantial part of the whole rent. That involves apportionment to ascertain the rent of the dwelling itself and it follows that to ascertain the rent payable in respect of the land under s. 48, sub-s. 1, of the County Courts Act, there must be apportionment. If rent includes a payment in respect of furniture it cannot be all payable in respect of the land.

As to the deduction of rates, the authorities indicate (see *Roussou* v. *Photi* (3)) that if a definite figure has been agreed for rent, the court cannot inquire who has to bear the rates. But if there is no specific figure because part is attributable to the use of furniture, there is no reason why the judge must, in arriving at the rent of the house, include in it the amount of the rates, when they are, as here, borne by the landlord. The county court judge was right in thinking he had jurisdiction to hear the proceedings. The rent attributable to the land is less than 100*l.* and there is evidence that the value of the land is less than 100*l.* a year.

LORD GREENE M.R. : This appeal raises a simple question which is not without importance ; but I have come to a clear conclusion as to the proper answer. The action was brought in the county court to recover possession of a house held on

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(1) L. R. 3 Q. B. 672.
(2) [1921] 2 K. B. 755.
(3) [1940] 2 K. B. 379.

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a monthly tenancy, the tenancy having been determined by notice to quit and the tenant having failed to deliver possession. The only question is whether the county court judge had jurisdiction to entertain the action. He held that he had jurisdiction and made an order in favour of the plaintiff. Against that order the defendant appeals.

The house was what is commonly called a furnished house, and the rent payable was 273*l.* a year. By s. 48, sub-s. 1, of the County Courts Act, 1934, the jurisdiction of the county court is defined as follows: "A county court shall have "jurisdiction to hear and determine any action for the "recovery of land where neither the value of the land in "question nor the rent payable in respect thereof exceeds the "sum of one hundred pounds by the year." The learned county court judge was apparently satisfied that the value of the land did not exceed the sum of 100*l.* a year, but that was not sufficient to establish his jurisdiction because it had to be shown that the rent payable in respect of the land did not exceed the sum of 100*l.* a year. The judge was confronted by the fact that the rent payable was 273*l.* a year and therefore in order to obtain jurisdiction he had in some manner to get that figure down to an amount not exceeding 100*l.* a year. He did that in this way. He accepted evidence in relation to the furniture which satisfied him that it was worth a sum of 150*l.* a year; he therefore deducted 150*l.* He also inquired into the question of rates and water rate, which under the lease were payable by the landlord and he ascertained that they amounted to 31*l.* for rates and 4*l.* odd for water rate; he therefore deducted those sums. He also appears to have made a deduction of about 10*l.* in respect of chief rent; but that is rather obscure and it does not matter for the purposes of this appeal whether he was or was not making that deduction because the total of the amount he deducted in respect of furniture, rates and water rate gave him a figure below 100*l.*

It is argued by the defendant that there is nothing in the County Courts Act which justifies any such process. The words of the sub-section which are crucial in this case are "the rent payable in respect thereof," that is, in respect of the land in question. It is pointed out that the sum of 273*l.* referred to in the lease is unquestionably rent and issues out of the land demised. That is a matter which has been settled for very many years. It is truly rent because it can be distrained for and rent in the definition of Coke upon Littleton

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—I read the citation from Foa on Landlord and Tenant (6th ed.), p. 123, is: "A certain profit reserved or arising "out of lands or tenements whereunto the lessor may have "recourse to distrain." The 273*l.* in this case unquestionably satisfies that definition. It is argued by Mr. Barry that even accepting that definition it cannot be said that the rent is payable in respect of the land in question and that the only way to discover how much rent is payable in respect of the land is to dissect the sum of 273*l.* and make a notional apportionment of part of it to rent in respect of the land and part of it to payment for use of the furniture.

It cannot be doubted that in order to make certain Acts of Parliament work and to achieve their obvious purpose an apportionment of one integral sum is often necessary. It is extremely familiar in the law relating to income tax and an example of it, germane to the present type of questions, is to be found in the Rent Restrictions Acts. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2, proviso (i) enacts that the Act is not to apply to "A dwelling-"house bona fide let at a rent which includes payments in "respect of board, attendance, or use of furniture." What that section, having regard to the manifest purposes of the Act, means is that to make it work you must examine an integral rent and attribute part of it to the furniture. You cannot make sense of it unless that purely artificial process is gone through. It is necessary in order to make the Act work and that that is the intention of Parliament is made manifest when the amending s. 10 of the Act of 1923 is looked at, because that uses this expression: "A dwelling-house shall "not be deemed to be bona fide let at a rent which includes "payments in respect of attendance or the use of furniture "unless the amount of rent which is fairly attributable to the "attendance or the use of the furniture, regard being had to "the value of the same to the tenant, forms a substantial "portion of the whole rent." Even there, it seems to me, an inaccuracy has not been avoided because it would not be true to say that an amount of rent is attributable to the use of the furniture. What might be true is to say that it would be right to attribute part of the rent to the fact that the use of the furniture is included in the contract. It is perfectly true that the amount of the rent of a furnished house is loaded by reason of the fact that under the contract the tenant is going to have something more than the mere occupation of the house, namely, the use of the furniture. That does not mean that the total figure arrived at is any the less rent, nor is it true to say that part of the rent must be treated as rent for furniture. It is entirely artificial. In the Rent Restrictions Acts that artificiality must be made use of in order to make them work at all and it is clear that that was the intention of Parliament. But in the County Courts Act we are not assisted by any consideration of that kind. There is nothing in the Act to suggest that any artificial meaning is to be put on the words of s. 48 or that some artificial process is to be gone through for the purpose of arriving at a result which has no reality at all. When this process of dissection has taken place it is quite untrue to say that that portion of the contractual sum which is attributed by the court to the rent is the rent payable in respect of the land. It is not. It is an entirely artificial figure and the rent payable in respect of the land is the contractual rent which issues out of the land and for which distraint may be levied. It seems to me quite untrue to say that because historically the rent was arrived at in the negotiation between the parties by taking into consideration the fact that use of the premises was to include furniture, the figure so arrived at is any the less rent in respect of the land. If the legislature had meant that in such cases apportionment was to take place it could quite easily have said so by the use of appropriate language. Section 10 of the Rent Restrictions Act of 1923 used language which, though, as I have said, not strictly accurate, at any rate made it clear that such an apportionment was to take place, and it could easily have used language of that kind in s. 48 of the County Courts Act if it had so intended.

It is to be observed that the suggestion that dissection is to take place would, if well founded, apply in every case where under a lease the tenant obtained some additional advantage. I put a case to Mr. Barry in argument which is not uncommon, the case where a landlord lets a shop to a tenant and undertakes not to carry on a competing business in some neighbouring shop of his own. The rent payable in such a case is obviously, as a matter of business and figures, arrived at by taking into consideration the fact that the landlord is binding himself by this covenant and the tenant getting that additional advantage. It seems to me that in that case it would be impossible to say that the rent in the lease must, in order to determine the question of county

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court jurisdiction, be dissected and some part of it attributed to the value of the covenant and the residue only to the value of the right of occupation under the lease. After all, cases where the tenant gets something over and above the mere tenancy of the land are legion and of infinite variety and in every case according to this argument you would have to split up the amount and take an artificial figure as being the rent in respect of the land and treat the balance as a payment in respect of the collateral or additional advantage. I can find nothing in the sub-section to justify any such process.

Mr. Barry placed reliance on the provisions of the Rent Restrictions Acts which I have quoted and said that regard should be had to them in construing s. 48, sub-s. 1, of the County Courts Act. I cannot accept that proposition. I cannot imagine anything more dangerous than to attempt to construe an Act of Parliament directed to a totally different subject-matter by having regard to the very special, very obscure and artificial language of Acts which is directed to a totally different subject matter and actuated and governed by a completely different policy. I can find no assistance in the provisions of the Rent Restrictions Acts. Mr. Barry submits that if for the purposes of those Acts a rent includes an ascertainable payment in respect of furniture it is possible to say for the purposes of the County Courts Act what rent is payable in respect of the house. That is, I think, a quite illegitimate argument and I must decline to accept it. So far, therefore, as furniture is concerned I think that the section must be interpreted in accordance with its obvious and prima facie meaning and that the rent payable is rent payable in respect of the land in question and that it is impossible to dissect the rent and say that part is payable in respect of the land and part in respect of the furniture.

That is sufficient to dispose of this case because unless the 150*l*. is deducted the rent of the land is not reduced to 100*l*. But the learned county court judge also deducted the amount of the rates and water rate and it is right for me to say something about that. It seems to me that it was just as illegitimate to dissect the contractual figure by deducting those sums as it was in the case of furniture; but the answer is perhaps even simpler because I can see no justification for suggesting that when, under the tenancy agreement or the lease, the landlord takes the burden of the rates the figure of rent which the tenant covenants to pay is anything at all except rent in respect of the premises. What else is it? You cannot dissect that figure and say that part of it is paid in respect of the premises and part of it is in the nature of an indemnity to the landlord for the obligation which he is taking off the tenant's shoulders. Historically no doubt that is how the figure of the rent is built up, for rates are a thing which any intending landlord or tenant and any house-agent will take into consideration when discussing and arriving at an agreed figure for the rent. But that is all history. When the rent is agreed it is rent and nothing else and the fact that the landlord has insisted on that particular figure because he is taking on the duty of paying the rates seems to me to have nothing to do with the case.

I am averse to referring to authorities on one Act of Parliament for the purpose of construing another and quite different Act, but, as it was referred to, I will say that the reasoning in *Mackworth* v. *Hellard* (1) is entirely consistent with the view that I have just expressed. I have reached that view not because I rely on that authority or regard it as in any way governing the decision in this case: I merely mention it by way of showing that I have not forgotten it and to give myself such satisfaction as may be gained from the fact that it is quite consistent with the view that I take. Mr. Barry tries to meet these arguments in an ingenious way. He says, on the assumption that he is right on the question of the furniture, which I have held he is not, that once a deduction is made in respect of the furniture there is no figure which can be described as rent payable in respect of the land. That, with all respect to him, seems to me to be getting the best of both worlds. He takes what is the rent and says: " Part of this is payable " in respect of the furniture and I have therefore deducted " that." Then when it is said against him: " That which " is left is rent payable in respect of the land," he says: " Nothing of the kind; there is no figure of rent payable in " respect of the land." It seems to me that he is bound on that footing to say that what is left is payable in respect of the land.

There is one concluding argument I should mention. It was to this effect: The sum of 273*l.* was not rent payable in respect of the land and if, contrary to the first submission, no apportionment is permissible then it still remains the fact that is is impossible to say of these premises that there is

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(1) [1921] 2 K. B. 755.

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any rent payable in respect of them because the sum of 273*l.*, if not apportionable, is a rent payable in respect of two things, namely the premises and the furniture; therefore, he says, the only matter which has to be taken into account is the value of the land and that is below 100*l.* per annum. I cannot take that view. I have already said that in my opinion the whole sum of 273*l.* is payable in respect of the land and it cannot therefore be said that no rent is payable in respect of the land. If Mr. Barry's argument was right, then, in spite of his protests when the matter was put to him, I can see no reason for excluding from this view cases such as the one I have mentioned where the landlord enters into a restrictive covenant and numbers of other quite common cases of tenancies and leases. The only matter which the learned county court judge would then have to consider would be the value of the land and he would never have to consider rent because if Mr. Barry's argument were accepted it would mean that wherever the tenant was getting an additional or collateral benefit it would be impossible to say that the contractual figure was payable in respect of the land because the tenant was getting something in addition.

It seems to me that all these highly artificial ideas are not to be extracted from the simple language of the sub-section which has, in my opinion, the meaning I have attributed to it. In the result the appeal must be allowed and the judgment of the learned county court judge reversed with costs here and below.

DU PARCQ L.J.: The Master of the Rolls has dealt fully with the point raised in this case in a judgment with which I agree. I only desire to add a few words. I agree, as I have said, with the whole of the judgment and particularly with my Lord's observations as to the point raised which depended on the construction of the Rent Restrictions Acts. These Acts are difficult enough to construe and it would be indeed a misfortune if we had to construe earlier Acts in the light of them and put the work of draftsmen who are no longer with us to the severe test of seeing how far they can be reconciled with, and made to fit in, the framework of which the Increase of Rent Acts form a principal part. It is quite unnecessary and it would be quite wrong to attempt to do anything of the kind. The County Courts Act with which we are dealing was enacted as recently as 1934 but it was an Act to consolidate certain enactments relating to county courts. The first County Courts Act was passed in 1849 and although we have not traced this particular section to its source, at any rate we know that it was in existence in the enactment of 1867. It may have been earlier. The result is that we must assume that when s. 48, sub-s. 1 was enacted, Parliament did not concern itself at all about the Increase of Rent Acts because it was merely repeating legislation framed a very long time before those Acts were thought of. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to put the matter very politely (I quote words used of other Acts by Lord Halsbury), "avoids technology, whether the avoidance of "technology has caused the draftsman to fall into other "troubles is a question I will not decide." I say no more about that. Certainly the draftsmen of 1867 may be supposed to have had in mind the old and, one may say, elementary learning which is to be found in the passage in Foa on Landlord and Tenant (6th ed.), p. 123. When the draftsman talked of rent he meant what lawyers mean by rent and when that is understood the section becomes clear. I doubt very much if the learned judge would have attempted to embark on this apportionment if he had not become accustomed to the apportionment of rent as between house and furniture under the Increase of Rent Acts. I doubt if before those Acts it would have occurred to a judge that he was bound or empowered to embark on such apportionment. Section 48, sub-s. 1, of the Act, construed according to the ordinary language of lawyers, is plain enough, and, if so, we know what the rent is. The parties call it rent. The plaintiff's witness says the rent included the use of the furniture and also rates and water rate. That, I think, is the end of the matter.

I agree, further, that it is impossible to say that because a total sum has been agreed which includes payment for the use of furniture, one cannot regard the total sum as rent; and I am not at all sure that Mr. Barry's client would in the end be very grateful to him if that argument prevailed, because it would mean that the landlord letting a house with furniture was receiving no rent and therefore, I presume, would lose the right to distrain for rent.

I agree that the appeal must be allowed.

TUCKER L.J.: I agree and I think the case is really quite clear. Mr. Barry had to rely on the words of s. 48, "payable

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"in respect thereof." It seems to me that once it is conceded that the money payment is properly described as rent, that is to say that it is a payment which issues out of the land and for the non-payment of which the right to distrain exists, that is really an end of the matter. Anything which answers that description is in my opinion properly described as "payable "in respect of the land" and that is the very essence of rent. In this case it is to be observed that the County Court Rules, 1936, provide in Or. 7, r. 3, that "in an action for the recovery "of land the particulars shall contain a full description of the "land sought to be recovered and the annual value thereof "and the rent (if any), and shall state the ground on which "possession is claimed." In this case that rule was not complied with by stating the rent as it should have been by the plaintiff. I am not attempting to construe s. 48 of the Act of Parliament by reference to the language of the rule made under it, but it is to be observed that the draftsman of the rule did not think it necessary to say anything about rent "payable in respect thereof"—which fortifies my view that the fact that it was rent shows that there was no need to use such language as "payable in respect thereof."

What I have said applies to an Act which is not dealing with the question of apportioning the rent. In an Act like the Rent Restrictions Acts which lay down the procedure for apportioning the rent as between different benefits the tenants receive therefor, different considerations arise and it seems to me impossible to read into s. 48—as I think Mr. Barry has to do—after the words "rent payable in respect thereof" the words "or such proportion thereof as the county court judge "shall determine to be fairly attributable to the enjoyment "of the land." It is impossible to read language of that kind into s. 48.

Appeal allowed.

Solicitors: *Maude & Tunnicliffe for Jackson, Barrett & Gass, Stockport; Barlow, Lyde & Gilbert for L. G. Ruddin & Co., Manchester.*

H. C. G.

HARRISON *v.* METROPOLITAN PLYWOOD COMPANY.

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Nov. 6, 7, 8, 30.

Hilbery J.

Factory Acts—Dangerous machinery—Fencing—Spindle moulding machine—Injury to employee other than operator—Breach of statutory duty—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1*—Woodworking Machinery Regulations,* 1922 (*St. R. & O.* 1922, *No.* 1196), *reg.* 17.

The plaintiff, who was employed as a press operator at the defendants' woodworking factory, was at work at his machine when a piece of the cutter of the machine next to his, which was a spindle moulding machine, broke away, flew out of its holder and struck and injured him. The spindle moulding machine had a guard of the type usually provided for such machines, but it was proved that it would have been possible to provide a guard which would probably have prevented the injury to the plaintiff:—

Held, that the defendants' duty was to fence the machines in their factory in accordance with the Woodworking Machinery Regulations, 1922, and had failed to discharge that duty; that those regulations ought not to be construed as made only for the protection of workers at their particular machines; and that the plaintiff was entitled to damages.

ACTION tried by Hilbery J.

The plaintiff was employed as a press operator at the defendant company's woodworking factory at Leonard Street, London, E.C.2. On June 19, 1944, the plaintiff was at work at his machine in the factory, which was next to a vertical spindle moulding machine, when a part of the cutter of the spindle moulding machine broke away and a piece flew out of its holder and buried itself in the muscles of the plaintiff's thigh. As a result the plaintiff was incapacitated until November, 1944.

The plaintiff brought this action against the defendant company claiming damages for the injury suffered by him on the grounds of breach by the defendants of (*a*) their statutory duty (1), and (*b*) their common law duty. It was agreed that if the plaintiff were entitled to succeed the damages should be reckoned at 125*l*.

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(1) Factories Act, 1937, s. 14, sub-s. 1: "Every dangerous part "of any machinery . . . . shall "be securely fenced unless it is in "such a position or of such con-"struction as to be as safe to "every person employed or work-"ing on the premises as it would "be if securely fenced . . . ."

Section 60, sub-s. 1: "Where "the Secretary of State is satisfied "that any manufacture, ma-"chinery, plant . . . . used in "factories is of such a nature as "to cause risk of bodily injury to "persons employed in connexion "therewith . . . . he may . . . . "make such special regulations as "appear to him to be reasonably "practicable . . . ." Sub-s. 2:

Evidence was given that there was a guard on the spindle moulding machine of the type usually provided for such machines, but that it would have been possible to provide a guard which would probably have prevented the accident to the plaintiff.

Edgedale for the plaintiff. The defendants are liable for damages for injury to the plaintiff caused by their failure properly to fence the machine in breach of the Woodworking Machinery Regulations, 1922, although the plaintiff was not the operator of the machine. In *Hindle* v. *Birtwistle* (1) the occupier of a cotton factory was held liable for injury to an employee who was struck by a shuttle which flew out of a machine. So in the present case the defendants should be held liable for the injury done by a piece of the machine flying off and striking the plaintiff. The Woodworking Machinery Regulations, 1922, are of general application to all workers in the factory and do not apply only to protect operators at their own machines. Even if the Woodworking Machinery Regulations, 1922, do not apply to protect the plaintiff, the defendant's liability under the Factories Act, 1937, remains. In any case the defendants owe a duty of care at common law to all persons working in their factory. There was a defective system, because the defendants made no provision for seeing that the cutter was safe.

Quass for the defendant company. *Hindle* v. *Birtwistle* (1) is quite different from the present case. In that case there was evidence that shuttles had previously come out of the machine, but in the present case the evidence is that blades do not come out of the type of cutter block used by the defendants. The defendants are not under any statutory obligation to provide against such an accident as happened here. In *Miller* v. *William Boothman & Sons, Ld.* (2), the Court of

" Special regulations so made may " . . . . modify or extend with " respect to any class or description of factory any provisions of " Part I, Part II or this Part of " this Act, being provisions imposing requirements as to " health or safety."

Woodworking Machinery Regulations, 1922, reg. 17 : " The cutter " of every vertical spindle moulding machine shall when practicable be provided with the most " efficient guard having regard to " the nature of the work which is " being performed."

(1) [1897] 1 Q. B. 192.

(2) [1944] K. B. 337.

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Appeal held that the absolute obligation to fence imposed by the Factories Act, 1937, was modified by the Woodworking Machinery Regulations, 1922, and that occupiers of woodworking factories had no statutory obligation beyond the duty to comply with those regulations. The regulations are directed to the protection of employees working at their particular machines and the defendants have complied with them by providing an efficient guard protecting the worker of the spindle moulding machine. Even if there has been a failure to comply with their obligation, there is no evidence that such failure brought about the accident. [He referred to *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (1); *Vyner* v. *Waldenberg Brothers, Ld.* (2) and *Colfar* v. *Coggins & Griffith (Liverpool), Ld.* (3).] The defendants have not failed in their duty to provide proper plant. Their only duty in that respect is to take reasonable steps to obtain proper plant and that they have done. The fact that part of the cutter hit the plaintiff is not prima facie evidence of negligence, since it was caused by a defect which no reasonable examination would have disclosed. Even if the operator of the spindle moulding machine had been guilty of negligence, the defence of common employment provides a complete answer. There is no evidence of a faulty system.

Edgedale in reply.

Cur. adv. vult.

Nov. 30. HILBERY J. delivered a considered judgment in which he stated the facts and continued: The claim in this action is put on two grounds, (1.) breach of statutory duty, and (2.) breach of common law duty. The statutory duty said to have been broken is more particularly the duty laid upon the defendants by reg. 17 of the Woodworking Machinery Regulations, 1922. It is admitted that this regulation applied to the machine which caused the accident; but it is said, first, that the defendants complied with the regulation, and secondly, that if they did not, the plaintiff, who was not working at the machine, has no remedy for breach of the regulation since this is one of a set of special regulations which are substituted for and oust the provisions of s. 14 of the Factories Act, 1937, and which are all for the protection of the worker at the particular machine for the

(1) [1940] A. C. 152.
(2) (1945) 61 T. L. R. 545.
(3) [1945] A. C. 197.

fencing of which they provide, and are not intended to give a remedy, when they are not complied with, to anyone except that worker.

On consideration I have come to the conclusion that the second contention is not well founded, and that unless the first contention prevails, the plaintiff has a right to succeed. The duty laid upon the occupier in terms by s. 14 of the Factories Act, 1937, is to fence dangerous parts of any machinery—save for such machinery as is expressly excepted—so as to make it secure, not only for the worker at the particular machine which is dangerous, but for every person employed or working on the premises. Section 60, sub-s. 2, of the Act, however, provides that special regulations made under that section may "modify or extend with respect to any class or description "of factory any provisions of Part I., Part II. or this Part of "this Act, being provisions imposing requirements as to health "or safety." The statutory regulations for the use of woodworking machinery—non-compliance with which by the defendants the plaintiff says was the cause of his injury—are to be treated as regulations made under these provisions. In those circumstances the Court of Appeal has said in *Miller* v. *William Boothman & Sons, Ld.* (1): "In our opinion, these "regulations must be regarded as modifying the provisions of "s. 14 in respect of these machines and of substituting the "prescribed guarding and fencing for the absolutely secure "fencing which the section would otherwise require. It is "difficult, indeed, to see what other object these regulations "could have." Then a little further on in the judgment of the court they say: "To anyone reading them it could not "but appear that, provided he followed the provisions of the "regulations and saw that his saws were constructed and "protected in accordance therewith, he was fulfilling his duties "under the Act." Those statements were quoted with approval as a statement of the law by MacKinnon L.J. in *Nicholls* v. *F. Austin (Leyton), Ld.* (2).

In each of those cases the Court of Appeal was dealing with a case where the employer—the occupier of the factory—had complied with the requirements of the Woodworking Machinery Regulations, 1922, which the court was saying had been substituted for the absolute duty to fence imposed by s. 14 so far as concerned the provision and maintenance of a proper guard on the machine. The Court of Appeal was not con-

(1) [1944] K. B. 337, 341. (2) [1945] K. B. 50, 55.

sidering what the situation was in a case where the substituted duty had not been complied with. Nor did the court in either of those two cases decide more than this, that the Woodworking Machinery Regulations, 1922, were a code defining the employer's duty to fence and had been lawfully substituted, wherever they were applicable, for the absolute duty to fence so as to make the particular machinery secure which had originally been imposed by s. 14. In other words, the substitute regulations deal with the nature and extent of fencing which must be provided and maintained on each kind of woodworking machine. The Court of Appeal did not decide that, because the nature and extent of the fencing which had to be provided was prescribed by regulations, the terms of which indicated that their primary purpose was the protection of the workers at the machines, these regulations were therefore not also intended to be a protection to other workers in the factory. No doubt the primary consideration, where woodworking machinery is concerned, is the protection of the worker at the machine. The very fact that he works at the machine exposes him to particular risks. One would, therefore, expect, as the fact is, that the regulations would everywhere provide for securing as high a degree of safety for him as practicable. But it does not necessarily follow that the regulations must, therefore, be construed as only for the protection of the workers at the machines, and not for the benefit and protection of other workers in the factory as well. The modification effected by the regulations is a modification in the standard of fencing; it is not an elimination of certain classes of workers in the factory from a right to such protection as the modified fencing will afford. I am, therefore, of opinion that the plaintiff here has a right to maintain an action for damages resulting to him from a breach of the statutory regulations in question.

The question that then remains is whether or not the plaintiff has established a breach of these regulations. Regulation 17 requires the provision for the machine in question of the most efficient guard having regard to the nature of the work being performed. It was proved that there was a known form of cage guard which would have fenced the major part of the circumference of a circle round the vertical spindle with a wire-mesh screen, and that the work in hand could have been performed with that guard in position. Such a guard is in fact the subject of an illustration in the

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Safety Pamphlet No. 8 issued by the Home Office. It was further clear from the evidence that the so-called ring guard employed at the time was only a guard against certain dangers to which the worker at the machine would be exposed if it were not there; but there was no evidence that it was "the "most efficient guard." When asked whether it was, the expert called for the defendants replied that it was a "usual" form of guard for such a machine. On balance I think it is established that the plaintiff probably would not have sustained his injury if the regulation had been complied with.

The result is that, as in my view the plaintiff is not precluded from alleging that at the time of his accident he belonged to a class of persons for whose protection the Woodworking Machinery Regulations, 1922, were made, he is entitled to succeed. This view of the matter makes it unnecessary for me to decide whether the plaintiff could have succeeded in a claim based on breach of the defendants' common law duty apart from statutory regulation. There must be judgment for the plaintiff for 125*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Shaen, Roscoe & Co.*
Solicitors for defendants: *Davies, Arnold & Cooper.*

H. A. P.

Minister of Pensions v. *Ffrench* [1946] K. B. 260.
Distinguished. EVANS *v.* MINISTER OF PENSIONS - [1948] 1 K. B. 1

1946
Jan. 29.

Denning J.

MINISTER OF PENSIONS *v.* FFRENCH.

Pensions—Pensions Appeal Tribunal—"War injury"—"Injurious act"—Air raid warning—Black-out in factory—Worker in factory injured in going to shelter—Injury caused by falling over bag of steel material—Personal Injuries (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 8, *sub-s.* 1.

By s. 8, sub-s. 1 of the Personal Injuries (Emergency Provisions) Act, 1939, war injuries are defined as meaning "physical "injuries (*a*) caused by (i.) the discharge of any missile including "liquids and gas; or (ii.) the use of any weapon, explosive or other "noxious thing; or (iii.) the doing of any other injurious act; "either by the enemy or in combating the enemy or in repelling "an imagined attack by the enemy . . . ":—

Held, that "an injurious act" was an act which was in its nature injurious, namely, an act which was either intended to cause injury, or an act the natural and probable consequences of which was to cause injury. The words did not mean simply an act which caused an injury. The general system of black-out in a factory, the reduction of lighting and the regulations that the personnel should, on a warning being given, go to a shelter were not intended to cause injury, nor was it their natural and probable consequence to cause injury; and therefore the injury suffered by the applicant in falling over a bag of steel material while going to a shelter after an air raid warning had been given with the consequent reduction of lighting, was not caused by an injurious act within the definition and was, therefore, not a war injury.

APPEAL from a decision of a Pensions Appeal Tribunal.

Mrs. Elizabeth Ffrench was employed as a sweeper in the machine bay of a factory. She sustained a fractured elbow in falling over a bag of steel material while she was proceeding to the works shelter after the red and yellow light, the regular warnings for taking shelter, had been shown: and on this based her claim that she had suffered a war injury.

It appeared from the evidence given before the Pensions Appeals Tribunal, that "spotters" were employed night and day on the roof of the factory in question and that they received official information as to the direction enemy aircraft were taking and whether or not there was gunfire in the vicinity. It was left to the discretion of the "roof spotters" to decide on the kind of warning to be conveyed to the factory. Arc lights were in use day and night in this factory with pilot lights on the walls as well as amber and red lights for use for air raid signals. The amber light conveyed provisional warning; when the red light was shown all personnel had to proceed to shelter. When "roof spotters" were advised of aircraft approaching or gunfire getting closer the main arc lighting was switched off from the control room on the roof. This did not necessarily mean that danger was imminent, but there was about six and a half miles of glass roofing in this factory which although it was blacked out could not be said to be completely impervious to light. On the night in question, Friday, October 22, 1943, the amber light went up at 7.10 p.m., and the red at 7.23, amber again at 7.54, and the all clear at 8.27 p.m. There were no bombs and no "incidents" in the neighbourhood. Sweepers were employed in each bay of the factory day and night in shifts to keep the floor space as clear as possible, but in view of the nature of the work it was not possible to have a clear way through to the shelters, each bay having its own shelter, although everyone was conversant

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with the ruling in the factory regarding air raids. When the main lights were switched off, the whole place would appear dim in comparison. Although the younger people found no difficulty in seeing, it was quite likely that Mrs. Ffrench would not see after the dousing of the main lights. When the order to go to shelter was put in force there was almost always a rush.

In these circumstances, Mrs. Ffrench claimed that she had suffered a war injury within the meaning of s. 8, sub-s. 1 of the Personal Injuries (Emergency Provisions) Act, 1939 (1) but the Minister of Pensions rejected her claim on the ground that as there was no incident involving bombs or gunfire she had not sustained a war-injury. Mrs. Ffrench appealed to the Pensions Appeal Tribunal, before whom the facts set out above were proved.

For Mrs. Ffrench it was contended that "war injury" meant a physical injury caused by the doing of any injurious act other than the two classes of acts mentioned in sub-cls. (i.) and (ii.) of s. 8, sub-s. 1, of the Personal Injuries (Emergency Powers) Act, 1939 in repelling an attack by the enemy. It was argued for her that the switching on of the yellow and red lights established the position of an imagined enemy. The injurious act emerged from the fact (or allegation) that by order of the Government the factory authorities had put up black-out arrangements, and that these arrangements constituted a weapon used for the purpose of repelling an enemy attack, actual or imagined, and therefore the injury was to be accounted as a war injury. It was contended on behalf of the Minister of Pensions on the other hand that the expression "the doing of any other injurious act" in sub-cl. (iii.) must be construed as ejusdem generis with the enumeration of acts mentioned in sub-cls. (i.) and (ii.).

The Pensions Appeal Tribunal did not agree with the view of the Ministry of Pensions that the absence of bombs or gunfire was fatal to the claim and was further of opinion that the argument on behalf of the Minister was not good because the enforcement of the black-out arrangements was merely a weapon for the repulse of enemy action. It could not therefore agree that the ejusdem generis argument should prevail. For these reasons the Tribunal concluded that

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(1) The section is set out in the headnote. See also par. 25 of art. 1 of the War Injuries (Civilian) Scheme, 1944 (St. R. & O. 1944, No. 369) which contains a definition of "war injury" in similar terms.

Mrs. Ffrench's disablement of a fractured arm was caused by a war injury, and the Tribunal therefore allowed the appeal.

The Minister of Pensions appealed.

Sir Donald Somervell K.C. and *H. L. Parker* for the Minister.

John Thompson for the applicant, Mrs. Ffrench.

DENNING J. The main argument in this case for Mrs. Ffrench was that her injury was caused by the doing of an injurious act within s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939. The acts which are particularly suggested to be " injurious acts " are two, the reduction of the lighting in the glass-roofed part of the factory, and also the regulation that under those conditions the personnel shall go to the shelter on a warning being given.

I am quite satisfied that the words " injurious act " in this section do not mean simply an act which causes injury. Some meaning must be given to them in addition to that, because the word " injurious " would otherwise be otiose. In my view an " injurious act " is an act which is in its nature injurious, that is, an act which is either intended to cause injury, or an act the natural and probable consequence of which is to cause injury. In this case I am satisfied that there was no injurious act which caused the injury. The general system of black-out, the reduction of lighting, and the regulations that the personnel should go to shelter on a warning being given, are none of them intended to cause injury, nor is their natural and probable consequence to cause injury. That being so, I am satisfied that this injury was not caused by an " injurious act " within the definition.

It has been suggested in the case stated that the enforcement of the black-out is the use of a " weapon " for the repulse of enemy action. I do not think that it is. The word " weapon " is used in the section in its ordinary sense, not in an extended sense. Then it was said that the Minister of Pensions rejected the claim because there was no incident involving bombs or gunfire, but I do not read that as meaning that if there had been bombs or gunfire it would necessarily have been a war injury. If there had been bombs or gunfire taking place, there would be the discharge of missiles and the use of weapons, and in such a case the only question might be one of causation. That is absent here. This case must depend on whether this injury

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Denning J.

was caused by any "injurious act," and I find that it was not.

It is not necessary for me to consider the question whether these things were done "in repelling an imagined attack by the "enemy." It is sufficient for me to say that on the facts found by the Tribunal this is not a war injury, and the appeal will be allowed.

Appeal allowed.

Solicitor for Minister of Pensions: *Treasury Solicitor.*
Solicitors for applicant: *L. Bingham & Co.*

R. F. S.

C. A.

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Jan. 11, 14;
Feb. 1.

Lord Greene M.R.,
du Parcq and
Tucker L.JJ.

CUMBERLAND CONSOLIDATED HOLDINGS, LIMITED *v.* IRELAND.

Vendor and Purchaser—Sale with "vacant possession"—Rubbish in cellars making them unusable—Consequent failure to give vacant possession—Damages.

By a contract dated March 24, 1945, the plaintiffs agreed to buy from the defendant a disused freehold warehouse. By a special condition the property was sold "with vacant possession on "completion." By condition 9 (3.) of the National Conditions which also applied to the contract, the purchase was deemed to be made with full knowledge of "the actual state and condition of "the property" and it was to be taken as it was. The cellars extending under the whole warehouse were made unusable by rubbish including many sacks of cement that had hardened. The defendant having refused after completion to remove the rubbish, the plaintiffs did so and brought proceedings for damages for breach of the condition for delivery with vacant possession:—

Held, (1.) that the defendant had failed to give vacant possession of the property sold. A vendor who leaves chattels of his own on property sold by him to an extent depriving the purchaser of the physical enjoyment of part of the property has failed to give vacant possession, and it is no answer for the vendor to have abandoned his ownership of the chattels on completion; (2.) that condition 9 (3.) only refers to the state and condition of the property being sold and not to rubbish forming no part of the property agreed to be sold.

APPEAL from Whitehaven and Millom county court.

By a contract, dated March 24, 1945, the plaintiffs, Cumberland Consolidated Holdings, Ld., agreed to buy from the defendant, W. W. Ireland, freehold premises known as Guinea Warehouse, Whitehaven, for the sum of 1,000*l*. By the special conditions of sale the property was sold subject to the National Conditions so far as not inconsistent with the special conditions of which condition 7 provided: "The property is sold with vacant "possession on completion." Condition 9 (3.) of the National Conditions provided: "The purchaser shall be deemed to "buy with full notice in all respects of the actual state and "condition of the property sold (of whatever tenure) and shall "take the property as it is." Completion took place on May 3, 1945. The defendant left the cellars of the premises filled with so much rubbish that they were unusable until the rubbish had been removed. The plaintiffs had the rubbish removed at a cost of 80*l.* 0*s.* 7*d.*, and brought proceedings against the defendant for damages for breach of contract of this amount, the breach complained of being the failure to deliver with vacant possession. The defendant denied that there had been any breach of this condition and relied on condition 9 (3.) of the National Conditions.

According to the facts as found by the county court judge, the premises had been damaged by fire. The area covered by the disused warehouse was about 1,900 square feet and underneath the whole area were cellars below ground level covered or ceiled at ground level by a wooden floor. The height of the cellars was about nine feet and some two-thirds of this height was, when the negotiations commenced filled with rubbish consisting chiefly of bags of cement which had gone hard, and empty drums. It was all valueless, and its presence prevented the use of the cellars for any purpose. During the negotiations Mr. Baum, who was acting for the plaintiffs pointed out the rubbish to the defendant and he undertook to remove it. He did remove some of the rubbish but left the greater part in the cellars including all the bags of cement. The quantity of rubbish left in the cellars was so considerable as to affect the value of the property sold. It was so much as to preclude the use of the cellars in the way intended by the plaintiffs.

The county court judge said the plaintiffs did not base their claim on the defendant's oral undertaking to remove the rubbish but on condition 7 of the special conditions. On the question whether the covenant for vacant possession applied he had found no authority other than those cited, namely, *Savage* v. *Dent* (1) and *Isaacs* v. *Diamond* (2). He thought the words in condition 7 were not limited to mean only that the purchasers would be given immediate and actual possession without any

(1) (1737) 2 Strange 1064.

(2) [1880] W. N. 75.

adverse claim to possession by any person rightfully claiming: they meant also that the purchaser would be given such substantial, actual, physical and empty possession as would allow him to occupy and use the property purchased without first having to clear away great quantities of rubbish. The plaintiffs were therefore entitled to judgment for 80*l.* 0*s.* 7*d.* The defendant appealed.

J. P. Ashworth for the defendant. There are two classes of cases in which the question arises of what is meant by "vacant "possession." The first class to which *Savage* v. *Dent* (1) and *Isaacs* v. *Diamond* (2) belong are cases relating to service of proceedings for recovery of land when personal service cannot be effected: see ord. 19 r. 9. In those cases it is essential that the premises by means of which substituted service is to be effected shall be completely deserted. As between vendor and purchaser, however, vacant possession involves the absence of a claim by anyone else to a right in respect of the property being sold: see *James Macara, Ld.* v. *Barclay* (3) where a notice of requisition was held sufficient to prevent the delivery of vacant possession. In Williams on Vendor and Purchaser, 4th ed., p. 201, it is laid down that where property is sold with vacant possession, the vendor has to satisfy the purchaser that there is no adverse claimant and no occupier of the premises; and at p. 637 that the duty of the purchaser is carefully to inspect the premises. This is material because goods left on the premises may show a claim to possession. Here, however, the defendant gave up all right to the rubbish in the cellars on completion of the purchase. Further, this is not a case where he deposited the rubbish between the date of the contract and the date of completion. There is then no ground for saying that the defendant did not give vacant possession. The rubbish was on the premises when they were inspected in the course of the negotiations, and the proper course would have been for the purchasers to insist on a special condition in the contract to compel the defendant to remove the rubbish. Again, under condition 9 (3.) of the National Conditions the plaintiffs agreed to accept the property sold in the state that it was. The property was in a derelict condition owing to fire and the plaintiffs must be taken to have accepted the presence of the rubbish in the cellars.

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(1) (1737) 2 Strange 1064.
(2) [1880] W. N. 75.
(3) [1945] K. B. 148.

Heilpern for the plaintiffs. Condition 9 (3.) does not assist the defendant. That condition cannot prevail against the special condition for vacant possession. Further condition 9 (3.) refers to the state of the property of whatever tenure and cannot be taken to apply to rubbish left on it. The property being purchased was a derelict warehouse and the presence of rubbish in the cellars cannot be said to affect the state and condition of the property because it prevented the use of the cellars. A contract to purchase realty must be entered into on the assumption that rubbish will be removed, when that rubbish affects the enjoyment of part of the property. Again " vacant " possession " is not limited in meaning to the absence of any adverse claim. This limited meaning only applies to cases relating to substituted service and that is because in dealing with service the finding of a person is essential and substituted service can only be made on deserted premises. That does not assist in determining the meaning of " vacant possession " as between vendor and purchaser, a matter not decided by any authority. The right to vacant possession must give a right to physical enjoyment. Suppose every room had been filled with rubbish to the same extent as the cellars were, could it have been said that vacant possession had been given. Vacant possession must mean possession without impediments.

Ashworth replied.

Cur. adv. vult.

Feb. 1. LORD GREENE M.R. read the judgment of the court, in which, after stating the terms of the contract, he continued: The question which we have to decide is whether upon the facts as found the learned county court judge was wrong in law in holding that the defendant had failed to give vacant possession. If he was right in so holding, no question is raised as to the correctness of the judgment in regard to the measure of damage. It is not suggested that the contractual force of the obligation to give vacant possession came to an end when the conveyance was executed.

The facts are of an unusual character, and the question of law to which they give rise has not apparently been the subject of previous decision. The warehouse, which covered an area of some 1,900 square feet, had been disused for some time, and had been damaged by fire. Underneath the upper part of the warehouse, and extending over the whole area, there were cellars below ground level which were ceiled at ground level

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by a wooden floor. These cellars were some nine feet in height. When the negotiations began some two-thirds of this height was filled with rubbish consisting chiefly of bags of cement which had gone hard, and of empty drums. It was all valueless and, in the words of the county court judge, "its presence "prevented the use of the cellars for any purpose." During the negotiations the vendor undertook to remove the rubbish, but no attempt is made to base a cause of action on that undertaking. Some of the rubbish was in fact removed, but the greater part of it was left behind, amounting to a "considerable" quantity, so much as "effectively to preclude "the user of the property by the purchasers in the way and for "the purposes they intended." We are not clear as to what force, if any, the learned county court judge intended to give to this reference to intended user. Before the partial removal no user of the cellars was possible. The only evidence as to what was removed appears to have been that of Mr. Baum, who said that some drums only were removed, leaving two hundred drums, and that none of the other material was removed. We can find nothing in the evidence to suggest that this limited amount of removal to any substantial extent improved the previous position so far as non-usability was concerned, nor do we think that the judge's reference to intended user is to be construed as meaning that the cellars had been made usable for any purpose by reason ot the removal of some of the drums. The vendor havfng refused to remove the rest of the rubbish, the purchasers had it removed at a cost of 80*l.* 0*s.* 7*d.* It was not argued before us that the purchasers by accepting a conveyance had waived the alleged breach of the undertaking to give vacant possession.

One argument put forward by counsel on behalf of the vendor can be disposed of at once. It was to the effect that the purchasers could not complain of the presence of the rubbish owing to condition 9 (3.) of the National Conditions. But this condition relates to the "state and condition of the property "sold." The rubbish formed no part of the property sold and its presence upon the property sold cannot, in our opinion, be said to be covered by the words "state and condition of the "property sold." Those words refer, in our view, to the physical condition of the property sold itself, such as its state of repair, and do not extend to the case where the property sold is made in part unusable by reason of the presence upon it of chattels which obstruct the user. Such obstruction does not affect the "state and condition of the property" but merely its usability which is a different matter altogether.

The principal argument on behalf of the vendor was of a different character altogether. It was said that the expression "vacant possession" was merely used in contradistinction to "possession" simpliciter, in order to show that the property was on completion to be transferred free from any claim of right to possession in the vendor or any third person such as a tenant or a licensee: and that the presence on the premises of chattels which had been abandoned by the vendor did not constitute or evidence any such claim or right. It was admitted that the rubbish belonged to the vendor at the date of the contract, and that he could have removed it before completion. It was said, however, that he had abandoned the rubbish, and had accordingly reserved no right to keep it on the premises or to enter on the premises after completion in order to remove it. When asked on what date the abandonment took place, his counsel replied that it took place at the moment of completion. In considering this argument it is important to bear in mind the duties of a vendor pending completion. His position is that of a quasi-trustee for the purchaser. As was said by Jessel M.R. in *Lysaght* v. *Edwards* (1): "He is not "entitled to treat the estate as his own. If he wilfully damages "or injures it, he is liable to the purchaser; and more than "that, he is liable if he does not take reasonable care of it." An action for damages for breach of these obligations can be brought after conveyance—*Clarke* v. *Ramuz* (2)—at any rate in the absence of waiver. A vendor, who between contract and conveyance deposited on the property sold rubbish of his own which he desired to abandon, would clearly commit a breach of his obligations if the presence of the rubbish caused a substantial detriment to the property. In the present case the rubbish was on the property at the date of the contract, and was not deposited subsequently as in the example given. But at the date of the contract the rubbish still belonged to the vendor since admittedly no abandonment had then taken place. By abandoning his property in the rubbish he did something in relation to the land which was detrimental to the land. He converted a quantity of rubbish belonging to himself which was removable by him into a permanent source of damage. By the very act of abandonment he changed the whole situation, and in effect at that moment converted the land into a dump

(1) (1876) 2 Ch. D. 499, 507. (2) [1891] 2 Q. B. 456.

for his rubbish. In these circumstances, there being no waiver or consent by the purchaser, we are of opinion that an action would have lain for damages for breach of trust, and that the measure of damages would have been the same as that awarded by the judgment under appeal.

But it is said that the cause of action is not breach of trust, but breach of the contract to give vacant possession. This is no doubt true, although we should be averse to dealing with this appeal on what is no more than a point of pleading. But even if full weight is given to the objection, we do not think that it ought to be allowed to assist the vendor for this reason. If there had been no abandonment, and the property in the rubbish had remained in the vendor after completion, there would, in our opinion, have been a breach of the undertaking to give vacant possession. Subject to the rule de minimis a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment. Counsel for the vendor endeavoured to escape from this difficulty by relying on the abandonment which he said necessarily negatived any such claim by the vendor: once he abandoned the rubbish it could not be said that he was using the property as a place for deposit for his chattels since ex hypothesi the rubbish was no longer his. But if we are right in our view that by abandoning the rubbish the vendor committed a breach of trust, can he be allowed to allege his own breach of trust as a defence to the present action? To allow him to do so would lead to serious injustice, and, in our opinion, he is precluded from raising this point. In fact he is in a dilemma; for he must be claiming the right either to keep property of his own on the premises, or to use the premises as a place on which to deposit rubbish which he desires to abandon. In either case his action is inconsistent with the purchaser's rights.

But there is, we think, a quite different ground upon which the judgment under appeal can be supported. The phrase "vacant possession" is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of "vacant "possession," and it is the duty of the vendor to eject such a person before completion. See *Royal Bristol Permanent Society* v. *Bomash* (1) and *Engell* v. *Fitch* (2). The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right. When we speak of a physical impediment we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property. Such cases will be rare, and can only arise in exceptional circumstances, and there would normally be (what there is not here) waiver or acceptance of the position by the purchaser. The facts as found by the county court judge are of a very exceptional nature, since the presence of the rubbish which the purchaser never bought and to whose presence he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for Howson, Dickinson & Mason, Whitehaven; William Charles Crocker for W. C. Sumner, Whitehaven.*

(1) (1887) 35 Ch. D. 390, 395. (2) (1869) L. R. 4 Q. B. 659.

H. C. G.

STACEY *v.* WILKINS.

1946
Jan. 28.
Lord Goddard C.J., Humphreys and Henn Collins JJ.

Lottery—Private lottery—Breach of conditions in Statute—Printing tickets for use in lottery—Failure of printer to print names and address of promoters on ticket—Whether printer liable for taking part in unlawful lottery—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *ss.* 22, 24.

A private lottery was promoted by the sports and entertainments committee of a branch of the British Legion, and the committee

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employed a printer to print tickets for use in the lottery. The tickets had the following words printed on them : " Sale of these " tickets confined and restricted to members of the British Legion " Briton Ferry . . . . Promoters. The British Legion Sports " and Entertainments Committee for the British Legion, Briton " Ferry Branch Benevolent Fund. O. D. Richards, Sports Secre- " tary." No other name and address was given of the promoters. Some tickets were sold to persons outside those to whom under the statute it was lawful to sell them. The printer was charged with unlawfully printing tickets for use in the lottery contrary to s. 22 of the Betting and Lotteries Act, 1934 and was convicted and fined:—

Held, that the condition set out in s. 24, sub-s. 2, of the Betting and Lotteries Act of 1934, for conducting a private lottery, namely that " every ticket shall bear upon the face of it the names and " address of each of the promoters " had not been complied with by printing on the ticket a statement that the promoters were a committee. Where the promoters of a private lottery were a committee the names and address of the members of the committee must be printed on the ticket. A lottery which is not unlawful because it is a private lottery does not become unlawful because one of the conditions required by s. 24, sub-s. 2, of the Betting and Lotteries Act, 1934, for conducting a private lottery has been broken. Therefore the printer was not guilty of an offence under s. 22 for which he was summoned, although he might have been charged and convicted under s. 24, sub-s. 3, of a breach of one of the coditions required by s. 24, sub-s. 2, for the conduct of a private lottery.

CASE STATED by Glamorganshire justices.

At a court of summary jurisdiction sitting at Port Talbot an information was preferred by the respondent Lewis Wilkins, superintendent of police, against the appellant Harold George Stacey, charging him with having, on an unknown day or days between January 1, 1944 and September 15, 1944, unlawfully printed at Neath, in connexion with a lottery called the British Legion Briton Ferry Lottery promoted at Briton Ferry, certain tickets contrary to s. 22 of the Betting and Lotteries Act, 1934 (1).

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(1) Betting and Lotteries Act, 1934, s. 21 : " Subject to the provisions of this Part of this Act, all " lotteries are unlawful."

Section 22, sub-s. 1 : " Subject " to the provisions of this section, " every person who in connexion " with any lottery promoted or " proposed to be promoted either " in Great Britain or elsewhere— " (*a*) prints any tickets for use in " the lottery . . . . shall be guilty " of an offence."

Sub-section 2 : " In any pro- " ceedings instituted under the " preceding subsection it shall be a " defence to prove that the lottery " to which the proceedings relate " was such a lottery as is declared " by any subsequent section of this " Part of this Act not to be an " unlawful lottery, and that at the

At the same time and at the same court informations were preferred against David Bromham and fifteen other persons alleging against each that he had aided and abetted, counselled and procured one Owen Waldo Richards (*a*) to distribute tickets in the lottery, and (*b*) unlawfully to cause one Joseph to sell such tickets, in each case contrary to s. 22 of the Act of 1934. Informations were also preferred against Richards and Joseph, who were both convicted and fined, but did not appeal.

Of the facts established at the hearing of the informations the following were relevant more particularly to the appeal of Stacey. The facts relating more particularly to the other defendants were not material for the purposes of this report. The appellant, Stacey was a printer carrying on business at Neath under the name "Sports Publications, Neath." The defendants charged in the other informations were, Bromham the chairman, and fifteen other defendants who were officials and members, of the General Executive Committee of the

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"date of the alleged offence the "defendant believed, and had "reasonable ground for believing, "that none of the conditions required by that section to be "observed in connexion with the "promotion and conduct of the "lottery had been broken."

Section 24, sub-s. 1: "In this "section, the expression 'private "'lottery' means a lottery in "Great Britain which is promoted "for, and in which the sale of "tickets or chances by the promoters is confined to, either "(*a*) members of one society "established and conducted for "purposes not connected with "gaming, wagering or lotteries ". . . . and which is promoted by "persons each of whom is a person "to whom under the foregoing "provisions tickets or chances "may be sold by the promoters "and, in the case of a lottery "promoted for the members of a "society, is a person authorised "in writing by the governing body "of the society to promote the "lottery."

Sub-section 2: "A private "lottery shall be deemed not to be "an unlawful lottery, but the "following conditions shall be "observed in connexion with the "promotion and conduct of the "lottery, that is to say . . . . "(*d*) every ticket shall bear upon "the face of it the names and "address of each of the promoters "and a statement of the persons to "whom the sale of tickets or "chances by the promoters is "restricted, and a statement that "no prizes won in the lottery shall "be paid or delivered by the "promoters to any person other "than the person to whom the "winning ticket or chance was "sold by them, and no prize shall "be paid or delivered except in "accordance with that statement."

Sub-section 3: "If any of the "conditions specified in the preceding subsection is broken, "each of the promoters of the "lottery, and where the person by "whom the condition is broken is "not one of the promoters, that "person also, shall be guilty of an "offence."

Briton Ferry Branch of the British Legion. In 1944, the general executive committee had authorized the sports and entertainments committee of the Briton Ferry Branch to run lotteries for the benefit of the benevolent fund of the branch. In particular, a lottery was run for the week ending September 16, 1944. Richards was the secretary of the sports and entertainments committee. Before September 16, 1944, the sports and entertainment committee had entered into a contract with Stacey for the printing of 2,700 lottery tickets a week. For the week ending September 16, 1944, Stacey printed and sold to the sports and entertainments committee 2,700 lottery tickets, each bearing on its face the following words, so far as material, "Sale of these tickets confined and restricted to members of "the British Legion, Briton Ferry . . . . Promoters: The "British Legion Sports and Entertainments Committee for "the British Legion, Briton Ferry Branch Benevolent Fund. "O. D. Richards, Sports Secretary . . . . Sports Publications, "Neath." On the inside of the tickets were the names of seventy-four football teams. The charges made against the defendants other than Stacey related to the alleged unlawful sale on September 15 of two of the tickets printed by Stacey to a non-member of the British Legion. At the date when the tickets were printed, apart from the fact that the full names and address of each promoter were not printed on the tickets, there was no evidence that any of the conditions laid down by s. 24 of the Act of 1934 had been broken so far as Stacey was concerned, who had, before printing any tickets for the lottery in question, called the attention of the promoters to the necessity for compliance with that section.

It was contended for the appellant, Stacey, that no offence had been committed by him since, at the date when the tickets were printed, the lottery was not unlawful and he believed and had reasonable ground for believing that none of the conditions required to be observed by s. 24 had been broken; and that he had no case to answer as the sale complained of had taken place without his knowledge, he having taken all necessary steps to comply with the Act when printing the tickets.

It was contended for the respondent that, under s. 22, sub-s. 2 of the Act of 1934 Stacey must prove (*a*) that the lottery was such as was declared by some subsequent section in Part II. of the Act not to be unlawful; (*b*) that at the date of the alleged offence he believed and had reasonable ground for believing that none of the conditions required by s. 24 to be observed in connexion with the promotion and conduct of the lottery had been broken; that, unless he could prove that the sale of the tickets by the promoters was confined to members of the Briton Ferry Branch of the British Legion, s. 24, sub-s. 1, had not been complied with, and that therefore the lottery was unlawful and an offence had been committed notwithstanding that the sale to a non-member of the British Legion was made without his knowledge; and that in any event the appellant had failed to comply with s. 24, sub-s. 2 (*d*), in that the tickets did not bear upon their face the names and address of each of the promoters.

The justices were of opinion that the respondent's contentions were correct and that the sale and printing of the tickets were in breach of s. 22. They accordingly convicted the appellant Stacey and fined him 10*l*. They also convicted the defendants on the other informations imposing fines of various amounts. Stacey and the other defendants appealed.

Vernon Gattie for the appellant Stacey. The lottery was a private lottery and therefore legal under s. 24, but in connexion with which there had been, after the tickets were printed, breaches of the conditions to be observed in connexion with the promotion of a private lottery. The fact that tickets were sold to persons who were not members of the society does not make the lottery an unlawful one, and therefore make the printer liable under s. 22 for printing tickets for use in the lottery. Under sub-s. 2 of s. 22 it is a defence to any proceedings under sub-s. 1 of s. 22 to prove that the lottery to which the proceedings relate was declared in s. 24 not to be an unlawful lottery. One of the conditions to be observed in connexion with a private lottery is in (*d*) that "every ticket "shall contain upon the face of it the names and address of "each of the promoters." In the present case the tickets contained the name of the committee who promoted the lottery and the name of the secretary. That was a sufficient compliance with the condition laid down in para. (*d*) of s. 24, sub-s. 2, as it was the committee of the society who were promoting the lottery. It may be that the printer could have been charged and convicted under sub-s. 3 of s. 24 for breach of one of the conditions to be observed in connexion with the promotion and conduct of a private lottery, but the breach of that condition did not render him liable under s. 22, sub-s. 1 for an offence in connexion with an unlawful lottery.

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Sutton K.C. and *Morgan Evans* for the respondent. The reason why s. 24, sub-s. 2 provides that "every ticket" used in connexion with a private lottery "shall bear upon the face "of it the names and address of each of the promoters" is that the persons who are responsible for seeing that the provisions of the Betting and Lotteries Act, 1934, are carried out might know who were the promoters so if any question arose as to the legality of the lottery they might know against whom to proceed. The language of the section in this respect was very precise. The statement upon the tickets that they were issued by a committee of a society does not give upon the ticket the names and address of any of the members of the committee. Section 24, sub-s. 1, provides that "in the case of a lottery "promoted for the members of a society" each of the promoters "is a person authorized in writing by the governing body of the "society to promote the lottery" and therefore the promoters are not merely the agents of the society and the names and address of each promoter must appear on the face of the ticket. Tickets for use in a lottery which do not give the names and address of each of the promoters do not conform with the section. It is not sufficient to say on the face of the tickets that the promoters of the lottery is a society and give the name of its secretary. The governing body of a society must authorize certain individuals to promote the lottery and in order that the lottery shall be a private lottery the names and address of each of the promoters must appear on the face of the ticket. As that was not done in the present case the printer has committed an offence under s. 22 of the Act. [Lord Goddard C.J. The justices have confused a lawful lottery improperly carried out with an unlawful lottery.] The point that the information was laid under the wrong section ought to have been taken at the hearing and then it could have been amended. Inasmuch as the printer has not printed the names and address of the promoters on the tickets he has failed to prove that it was a private lottery properly carried out. He was therefore unlawfully printing tickets for use in a lottery and was properly charged under s. 22.

Vernon Gattie replied.

LORD GODDARD C.J., after stating the charge against the appellant and reading the relevant sections continued: The first thing to be observed is that the justices have found, among other things, that tickets were sold by persons connected with this lottery to persons outside those to whom under the statute it was lawful to sell them, and that offence was committed by certain other persons. The main charge against the printer was that the names and address of each of the promoters were not printed on the ticket, but it is important to observe, I think, especially in view of the finding of this court, that the justices apparently accepted the contention of the prosecution that because offences had been committed by persons in selling these tickets to people to whom they were not entitled to sell them, the printer became liable for that offence. So far as that is concerned, the court has no hesitation in saying that the justices came to a wrong conclusion.

But the point we have to consider first is whether or not the requirement that "every ticket shall bear upon the face of it "the names and address of each of the promoters" was complied with in this case. That is a point upon which it is no doubt important that this court should express an opinion for the purpose of giving guidance to printers and those responsible for seeing that the Betting and Lotteries Act is properly complied with and enforced. The tickets in this case had these words printed on them: "Sale of these tickets con-"fined and restricted to Members of the British Legion, Briton "Ferry . . . . Promoters:—The British Legion Sports and "Entertainments Committee for the British Legion, Briton "Ferry Branch Benevolent Fund. O. D. Richards, Sports "Secretary"; and that is the only name and address that is given of a promoter or promoters.

It seems to be perfectly clear from the facts found by the justices, and the tickets themselves, that this was a private lottery, but one of the conditions of conducting a private lottery is that every ticket shall bear on the face of it the names and address of each of the promoters. It has been pointed out by Mr. Sutton that the object Parliament must be deemed to have had in mind at that time was that those who are responsible for seeing that the Betting and Lotteries Act is carried out, or that illegal lotteries under it are suppressed, shall know who are the promoters of these private lotteries which are made legal, so that if there is any question as to their legality or otherwise, it should be known who are the people to be summoned; and in my opinion it is not possible to say that a statement that the promoters are a committee is a sufficient compliance with the section. If the promoters were a corporate body, no doubt it would be enough to give the name of the company or other corporate body which was acting as promoter, but where it is a committee it can only be the members of the committee who are the promoters, and therefore the names of the members of the committee who are the promoters must be given on the ticket, It does not follow that every member of the committee was a promoter; some of the members of the committee may have refused to sanction the lottery, in which case they would not be promoters.

It therefore appears to the court that the condition as to the names and addresses of the promoters was not complied with in this case. But a further difficulty arises here, and that is whether or not the offence for which this defendant was summoned was made out. As I have already pointed out, he was summoned under s. 22, sub-s. 1. Under that section by sub-s. 2, it is a defence for him to show that it was not an unlawful lottery, and this clearly was not an unlawful lottery because it was a private lottery as defined by s. 24. Then it is said that he must also show that " at the date of the alleged " offence the defendant believed, and had reasonable ground for " believing, that none of the conditions required by that section " to be observed in connexion with the promotion and conduct " of the lottery had been broken "; nor had they at the time of the alleged offence. What he might have been summoned for was for an offence under sub-s. 3 of s. 24, which provides: " If any of the conditions specified in the preceding sub- " section is broken, each of the promoters of the lottery, and " where the person by whom the condition is broken is not one " of the promoters "—and the printer is not one of the promoters—" that person also, shall be guilty of an offence." The offence, if any, which he committed, therefore, was in breaking one of the conditions, namely, the condition that the ticket should bear on the face of it the names and address of each of the promoters. Therefore, though he might have been convicted of an offence under sub-s. 3 of s. 24, in my opinion it is quite clear that he did not commit an offence under sub-s. 1 of s. 22.

I think the confusion which perhaps has arisen in this case is due to the fact that it has not been borne in mind that if the lottery is a private lottery, it ceases to be an unlawful lottery, and it does not cease to be a private lottery because one of the conditions in s. 24 is broken; that is an offence of conducting a private lottery, that is to say, a lawful lottery, in a wrong manner. That was the offence that was committed here, and it was not the offence for which the defendant was summoned. Therefore, so far as the printer is concerned, this appeal must succeed and the conviction be quashed.

HUMPHREYS J. I agree with the judgment of my Lord, and on the main point, which is the first point, I have nothing to add.

With regard to the second point, I think some assistance may be derived from a glance at s. 23 of the Act upon the question whether by breaking one of the conditions mentioned in s. 24, sub-s. 1 (*d*), the printer has committed the offence of printing tickets for use in a lottery which, as the result of s. 21 means an unlawful lottery or whether what the person is responsible for is the offence of printing tickets which do not comply with the requirements of sub-s. 2 (*d*) of s. 24, which is a separate offence. Very much the same thing is said in s. 23. It provides for the exemption of what are called small lotteries incidental to certain entertainments. There also persons who promote as an incident of certain entertainments what would be an unlawful lottery are not to be prosecuted because a lottery so promoted is not an unlawful lottery, and again I find the words " but the conditions " specified in the next succeeding sub-section shall be observed," and then : " every person concerned in the promotion or con-" duct of the lottery shall be guilty of an offence unless he " proves that the offence was committed without his know-" ledge." I think those words make it clear beyond question that what is being done is the creation of a new offence, and a specific defence is supplied for the person who can avail himself of it, that is, that he was unaware that the offence was being committed.

For that reason, as well as the reasons which have been stated by my Lord I agree also with the second part of the judgment and with the conclusion.

HENN COLLINS J. I agree and have nothing to add.

Appeal allowed (1).
Conviction quashed.

Solicitors for appellant Stacey : *Sharpe, Pritchard & Co. for T. D. Windsor Williams, Neath.*

Solicitors for respondent : *Torr & Co. for Richard John, Cardiff.*

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(1) The appeal in the case of *Bromham and others* was also allowed as counsel for the respondent did not seek to support the conviction.

R. F. S.

1946
Jan. 11, 14.

Croom-
Johnson J.

HAWTREY *v.* BEAUFRONT LIMITED.

Landlord and tenant—Construction of lease—Lease for period of national emergency—" Declaration by the Government "—Notice to quit—Validity—Notice addressed to directors of limited company—Validation of War-time Leases Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 34), *s.* 1, *sub-ss.* 1, 2, *s.* 2, *sub-ss.* 1, 2*—Tenancy Agreements* (*End of the War in Europe*) *Order,* 1945 (*St. R. & O.* 1945, *No.* 703/L. 8.)

By an agreement in writing, dated September 3, 1939, the plaintiff let a house to the defendants, a limited company, " for the " period of the national emergency or European war or threatened " European war to be computed from the date of the actual entry " on the premises by the tenants until such national emergency or " war shall have been terminated by the signing of terms of peace " or such other declaration by the Government that the National " emergency no longer exists." The defendants duly entered. On June 15, 1945, the plaintiff addressed to the directors of the defendant company one month's notice to quit. The defendants having failed to give up possession, the plaintiff brought an action claiming possession and mesne profits :—

Held, (1.) that, assuming that the tenancy was validated by the Validation of War-time Leases Act, 1944, as being a tenancy for the duration of the war within the meaning of that Act, the plaintiff was entitled to terminate it either in accordance with that Act by one month's notice to quit given after the termination of the war, for which purpose the date of the termination of the war was, by Order in Council, to be treated as May 9, 1945, or by one month's notice to quit under the tenancy agreement for which purpose the announcement of the surrender of Germany broadcast by the Prime Minister on May 8, 1945, was a declaration by the Government that the national emergency no longer existed ; and (2.) that the notice to quit was a good notice although it was addressed to the directors of the defendant company and not to the company itself.

Action tried by Croom-Johnson J.

The plaintiff was the owner of a house known as Marks Barn, Crewkerne, Somerset. The defendants were a limited company who up to 1939 conducted a school at Camberley, Surrey. On March 1, 1939, the parties entered into an agreement by which the plaintiff gave to the defendant company an option to take a tenancy of the plaintiff's house for the period of any national emergency or European war or threatened European war. On September 3, 1939, the option was exercised and by a tenancy agreement of that date the premises were let by the plaintiff to the defendant company at fifteen guineas a week " for the period of the national emergency or European war

" or threatened European war to be computed from the date of " the actual entry on the premises by the tenants until such " national emergency or war shall have been terminated by the " signing of terms of peace or such other declaration by the " Government that the national emergency no longer exists." The defendants entered forthwith. On June 15, 1945, after some correspondence between the parties' solicitors, the plaintiff's solicitors addressed a month's notice to quit to the directors of the defendant company at the company's registered office at Marks Barn, Crewkerne. The defendants having failed to vacate the premises, the plaintiff brought this action claiming possession and mesne profits.

G. R. F. Morris (*Horniman* with him) for the plaintiff. The plaintiff is entitled to possession because the tenancy has been duly determined by notice to quit. He was entitled to give notice to quit because the period of the national emergency for which the premises were let has terminated. The words " the emergency " and similar expressions are defined in s. 2, sub-s. 1, of the Validation of War-time Leases Act, 1944 (1). In the present case they

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(1) The Validation of War-time Leases Act, 1944, s. 1, sub-s. 1: " Subject to the pro-" visions of this section, any agree-" ment, whether entered into before " or after the passing of this Act, " which purports to grant or pro-" vide for the grant of a tenancy for " the duration of the war shall have " effect as if it granted or provided " for the grant of a tenancy for a " term of ten years, subject to a " right exercisable either by the " landlord or the tenant to deter-" mine the tenancy, if the war ends " before the expiration of that term, " by at least one month's notice in " writing given after the end of " the war . . . ." Sub-section 2: " In this section the expression " ' the duration of the war,' in " relation to any agreement, means " a period which, on the proper " construction of the words used " in the agreement whatever they " may be, ends with, or within a " specified time after, one of the " following events—(*a*) the end of " the war or of hostilities as " respects all the States with which " His Majesty is at war and all " theatres of war; (*b*) the end of " the war or of hostilities as " respects any particular State or " States or any particular theatre " or theatres of war; (*c*) the end " of the emergency mentioned in " the Emergency Powers (Defence) " Act, 1939, or of the period for " which that Act or any regula-" tion order, or power thereunder is " in force or of the emergency men-" tioned in any other Act of the " present Parliament; (*d*) the " end of the emergency (not " defined by reference to any Act " of Parliament) occasioned by the " war or hostilities, whether as " respects all the said States and " all theatres of war or as respects " any particular State or States or " any particular theatre or " theatres of war; (*e*) any event " likely to occur on or in connexion

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mean the end of the war with Germany, since that was the war which was in the contemplation of the parties at the time of making the tenancy agreement. The end of that war was declared by the Tenancy Agreements (End of the War in Europe) Order, 1945, to be May 9, 1945, for the purposes of the Act. The promulgation of that Order in Council and the statement by the then Lord Chancellor calling attention to that Order also constitute "a declaration by the Government that "the national emergency no longer exists" within the meaning of the agreement. The end of the war with Germany was also declared by the Prime Minister in his statement broadcast on May 8, 1945, and that is a declaration by the Government within the meaning of the agreement.

The notice to quit was a valid notice, although it was addressed to the directors of the defendant company. There was no ambiguity and so long as it was clear to the persons receiving it, then it fulfilled its purpose. In *Doe* v. *Spiller* (1), Lord Ellenborough held that a lessor might recover possession on a notice to quit addressed to the tenant by a wrong Christian name where the tenant did not repudiate it. [He also referred to *Dr. Jaeger's Sanitary Woollen System Co., Ld.* v. *Walker & Sons* (2), where a notice—not a notice to quit—to a managing

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" with any of the events aforesaid; " and any reference in this section " (other than this subsection) to " the end of the war shall, in " relation to any agreement, be " construed as referring to the end " of such one of the aforesaid " periods as is appropriate to that " agreement." Section 2, sub-s. 1: " Where any tenancy agree-" ment uses, for the purpose of " defining the term or purported " term of the tenancy or for any " other purpose, the expression " 'the war' or 'hostilities' or " 'the emergency' or any similar " expression which does not indi-" cate whether it refers—(*a*) to the " war or to hostilities as respects " all the States with which His " Majesty is at war and all theatres " of war or, as the case may be, to " the emergency occasioned there-" by; or (*b*) to the war or to " hostilities as respects any par-" ticular State or States or any " particular theatre or theatres of " war, or, as the case may be, to " the emergency occasioned there-" by; the expression shall be con-" strued as referring to the war " or hostilities as respects those " States with which His Majesty " was at war at the date when the " agreement was made, or, as the " case may be, to the emergency " occasioned thereby, unless it is " shown that the parties intended " that the expression should " be otherwise construed. The " court by whom any such agree-" ment is construed may admit " any evidence which in the " opinion of the court may throw " light on the intention of the " parties as to the meaning " of the said expression."

(1) (1806) 6 Esp. 70.

(2) (1897) 77 L. T. 180.

director was held by Kekewich J. to be notice to the company.]

Scott Cairns for the defendant company. It is admitted that the tenancy is only validated by the Validation of War-time Leases Act, 1944, but the tenancy is not limited to the duration of the war within the meaning of that Act. The defendants are entitled to retain possession under the agreement until some declaration is made by the Government that the national emergency no longer exists. No declaration within the meaning of those words in the agreement has yet been made. The announcement made by the Prime Minister on May 8, 1945, was not a declaration by the Government. The words "national emergency" in the agreement do not exclude the war against Japan and the intention of the parties in this respect is shown by the option agreement of March 1, 1939.

As to the notice to quit, it was invalid because it was not addressed to the right person. The notice, as worded, meant that the directors, and not the company, were to give up possession of the premises. But the directors never had possession. This may have been a slip, but a slip in a notice to quit will not be made good: *Hankey* v. *Clavering* (1). It is well known that directors are separate individuals in law from the company.

Morris replied.

CROOM-JOHNSON J. In *Lace* v. *Chantler* (2), the Court of Appeal decided that a tenancy "for the duration of the war" did not create a good leasehold interest on the ground, as I understand it, that the agreement did not define the period during which the enjoyment of the premises was to be had. As there were numerous agreements, in one form or another, "for the duration of the war," the matter had to be cured by legislation. [His lordship then read s. 1, sub.-ss. 1 and 2 and s. 2, sub.-s. 1 of the Validation of War-time Leases Act, 1944, and continued:] When I look at the document in this case I find it refers to the European war. I was invited at the Bar to say that the agreement included the Japanese War, which did not eventuate until some two or three years later. I find that the parties meant what they said and nothing more. They were dealing with the conditions on September 3, 1939, when this country was at war with one state only or at any rate with states in Europe, most of which were ultimately swallowed up,

(1) [1942] 2 K. B. 326.

(2) [1944] K. B. 368.

from the point of view of hostility, by the arch-leader of all, the German State. I find accordingly that the parties intended the words "national emergency or European War or "threatened European War" to refer to such states as were then at war with His Majesty.

Mr. Scott Cairns invited me to admit as evidence showing the intention of the parties as to the meaning of the expression which I have just read—which I regard as being too plain almost for argument—the option agreement of March 1, 1939. In order to see whether, in my opinion, the evidence proposed might throw any light on the intention of the parties I had to admit the document and look at it, but in my judgment it throws no light whatever on any topic which I have to consider. The words in that document are, except for one little point in regard to the use of the word "any," the same as in the agreement which I have to construe.

That being so, I have to come to a conclusion, first, whether this is an agreement which within s. 1, sub-ss. 1 and 2, and s. 2, sub-s. 1 of the Act of 1944 is an agreement for the duration of the war. Mr. Scott Cairns argued that this particular agreement was not an agreement for the duration of the war, but I pointed out to him that if it were not, the result would be that his clients were in under an agreement purporting to create a term which was not a good term, and it might be that they were trespassers. The parties, however, at the Bar have on each side admitted that this agreement is validated, so far as the duration of the term is concerned, by the Act of 1944.

I pass on to consider two further points: (1.) that, notwithstanding the Act of 1944, certain parts of the habendum of September 3, 1939, still bind the two parties, and (2.) that the notice given to terminate the tenancy was one which could not be given, either because the statutory provision itself had not been obeyed or because the terms of the agreement, so far as then subsisting, were not obeyed, and, finally, that in any event the notice was a bad notice because, it is said, it was not directed to the tenants at all.

I have some doubt whether the language used in this agreement brings the case within the mischief which the Act of 1944 was intended to allay, because it deals with "a threatened war" as well as "national emergency," and also because it seems to me to deal with three events and not one, as mentioned in s. 1, sub-s. 2, of the Act; but the parties have argued the case before me on the basis that the effect of the habendum in the tenancy agreement is to create a term for the duration of the war, and I propose to deal with it on that basis. I think that possibly this statute, which is intended to preserve and give effect to what the parties were intending to do, should be given a wide construction, and accordingly I shall deal with the matter on broad lines. The question is : Has the statute not merely substituted another term for the term which the parties thought they were creating, but has it got rid of that part of the original term or the conditions of the original term which provided for a time for its determination, namely, " until such national " emergency or war shall have been terminated by the signing " of terms of peace or such other declaration by the Government " that the national emergency no longer exists ? " Mr. Scott Cairns says there is nothing in the statute which prevents that part of the habendum continuing in force, that there never has been a signing of terms of peace or a declaration by the Government that the national emergency no longer exists, and that accordingly, notwithstanding that the term is still a good term by virtue of the Act of 1944, the landlord, the plaintiff, is unable to take advantage of the provisions of sub-s. 1 of s. 1 and give a notice when the war ends to put an end to the statutory term of ten years. Construing the statute benevolently, I think that the words " until such national emer- " gency " and so on, are a part of the language used in order to express the intention of the parties that this tenancy was to be for the duration of the war.

Supposing somebody else should take a different view about that I will consider the meaning of the words " or such other declaration by the Government that " the national emergency no longer exists." One of the difficulties here is the word " other," because the signing of the terms of peace is not a declaration by the Government, and I do not understand what value I am to give to the word " other." I do not think I can give the word any meaning, grammatically, there and I therefore have to examine only whether there is a declaration by the Government that the national emergency no longer exists.

That brings me to a consideration, first, of sub-s. 2 of s. 2, under which " His Majesty may by Order in Council declare " what date is to be treated for the purposes of any tenancy " agreement as —(*a*) the date of the end of the war," and so on, and then whether the agreement is to be construed in accordance with such Order in Council, since the end of that sub-section says, " unless the context requires, or it is shown by admissible " evidence, that it should be otherwise construed." By an Order in Council made on June 11, 1945 (1): " For the purposes " of the construction of any tenancy agreement, the ninth day " of May, nineteen hundred and forty-five, shall . . . . be " treated as the date of the end of the war and of hostilities as " respects each and all of the States in Europe with which His " Majesty has been at war at any time since the third day of " September, nineteen hundred and thirty-nine, and of the " emergency (not being defined by reference to any Act of Par" liament) occasioned thereby." If the statute applies fully to this tenancy agreement, as I think it does, the effect is that on May 9, 1945, and thereafter it was possible for the landlord to serve notice to bring to an end the notional term of ten years. But Mr. Morris also says that when that is promulgated by the Government of the day it becomes " a declaration by the " Government " within the terms of the agreement that the national emergency no longer exists, and for that purpose he put in evidence a statement by the then Lord Chancellor calling attention to the Order in Council, and he says that that amounts to a declararion by the Government. I feel a difficulty about that construction, and I am unable to accept that statement as a declaration by the Government. I think it is no more than what it purports to be, namely, an expression of the desire of the Lord Chancellor to draw the attention of landlords and tenants and their advisers to the Order in Council having been made.

Mr. Morris was on rather firmer ground when he referred to a statement made by the Prime Minister, Mr. Churchill, in a broadcast message on May 8, 1945, in which he announced the act of unconditional surrender by the enemy. That act was to be ratified in Berlin on that day and the ratification was confirmed by Moscow radio on May 9, the date fixed by the Order in Council to which I have already called attention. The Prime Minister plainly was declaring that the national emergency and state of war with Germany had come to an end, and in my view this declaration made by him, not as an individual but as Prime Minister, ought to be taken as a declaration by the Government. I do not think for the purposes of this agreement I ought to read " a declaration by the Government " as meaning something which is a joint and several dementi of each and all the members of the Cabinet or, perhaps more absurdly, of all those people who may be said broadly to be the Government. Everybody regarded the war and the state of emergency (not being one which is defined by any Act of Parliament) as having come to an end. The matter is by no means easy of decision, but having regard to what these parties were trying to do, and to the substitution of the term of ten years for the duration of the tenancy by the Act of 1944, subject to the statutory conditions, I think I ought to read the words "declaration of the Government" as being satisfied by what the Prime Minister of the day said, and by the promulgation of the Order in Council in addition, and that is my decision upon that part of the case.

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(1) Tenancy Agreements (End of the War in Europe) Order, 1945 (St. R. & O. 1945, No. 703/L. 8).

It is now necessary that I should deal with what the plaintiff says in regard to this notional period of ten years being brought to an end. By the terms of the statute: "If the war ends "before the expiration of that term" the landlord, subject to a right exercisable by the landlord or the tenant, can determine the tenancy by at least one month's notice in writing given after the end of the war, and that means in one case after May 9, or in the other case after June 11. Has the plaintiff effectually done that? [His lordship referred to certain correspondence which passed between the parties' solicitors between February 14 and June 15, 1945, in the course of which the plaintiff's solicitors stated that "the Government made the declaration that the "national emergency in Europe was over on the "8th instant and that the plaintiff desired to recover, "possession of the premises" and continued:] On June 15, 1945, the plaintiff's solicitors sent a letter to the directors of Beaufront Ld., enclosing the notice to quit in question, and also sent a copy of the notice to the defendants' solicitors. The notice was acknowledged. A member of the firm of the defendants' solicitors is one of the directors on the board of directors of the defendants, and it is quite plain that the notice was brought to the attention, at least, of that director. It is not suggested it was not brought to the attention of any of the other directors, and, indeed, the notice itself now comes out of the custody of the defendants' solicitors. The point the defendants take is that the notice is a bad notice for the reason that the addressees are the directors of Beaufront Ld., and not Beaufront Ld. The question which I have to determine is: Is a notice in that form a good notice or not?

Notices of this sort are documents of title. They are unilateral and not consensual documents. They have the object of bringing to an end a term in the land enjoyed by the tenant, and they have to be looked at with strictness in order to see whether they are in compliance with the rule illustrated by the decision of the Court of Appeal in *Hankey* v. *Clavering* (1). In the course of his judgment in that case Lord Greene M.R. said (2): "It is perfectly true that in construing such a "document, as in construing all documents, the court in a case "of ambiguity will lean in favour of reading the document in "such a way as to give it validity, but I dissent entirely from "the proposition that, where a document is clear and specific, "but inaccurate on some matter, such as that of date, it is "possible to ignore the inaccuracy and substitute the correct "date or other particular because it appears that the error was "inserted by a slip." The question which I have to determine is primarily a question of construction. There is no doubt that a notice to quit, when given by a landlord, should be given to the proper person, that is, to the immediate tenant of the giver or his executor or assignee, and not to a mere undertenant: see Foa on Landlord & Tenant, 6th ed., p. 673. At p. 675 the learned author says: "A notice to a corporation "should be addressed to the corporation . . . . An omission, "however, to address a notice to quit is cured if notice is proved "to have been delivered to the proper person"; and for that he cites *Doe* v. *Wrightman* (3). Then he goes on to deal with an error in the Christian name of the addressee and says: "A mistake "in the Christian name of the person (a tenant) to whom it "was given was held to be cured by his having kept the notice "without objection, there being no other tenant of the name "on the property of which the premises demised formed part." That is the case of *Doe* v. *Spiller* (4). That was mere falsa demonstratio.

Before I can determine the point I must look a little more closely at the rest of the notice. After being addressed to the directors of Beaufront Ld., it goes on to say: "Registered "Office formerly at Beaufront, Camberley, Surrey, but now at "Marks Barn, Crewkerne, Somerset. As solicitors and "agents for [the landlord] we hereby give you one month's "notice to quit and deliver up possession of the furnished "dwelling house," etc. Mr. Scott Cairns says "you" means the directors, and that when the document goes on to say

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(1) [1942] 2 K. B. 326.
(2) Ibid. 330.
(3) (1801) 4 Esp. 5.
(4) (1806) 6 Esp. 70.

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" together with the ground thereto belonging and which you " occupy," that is again a reference to the directors. But the document does not stop there; it says " which you occupy and " enjoy under the terms of an agreement dated the 3rd day of " September, 1939." There is no other objection to this notice to quit. It is precise in form. The length of time is right. The date of the agreement was September 3, 1939, and the only dubity in the matter arises from the use of the word " you " when the document starts by being addressed to the directors.

A limited company must, of course, act through agents. If it had been addressed to Beaufront Ld., the document would still have had to be delivered to an agent or sent through the post to the registered office of the company, where it would have been dealt with by an agent. I think that within the rule referred to by Lord Greene M.R. in the case I have mentioned, that in a case of ambiguity the court will favour the reading of the document in such a way as to give it validity, I ought to construe this notice as a notice to terminate the tenancy of the limited company under the agreement of September 3, 1939, as altered by s. 1 of the Act of 1944. It was obviously so treated by the defendants' solicitors. They knew all about it. They had been warned about the declaration by the Prime Minister of May 8 and the Order in Council, and it seems to me that any solicitor looking at this document would see that, while it is addressed to the directors, it is addressed to them, not in their capacity as tenants or as parties to the agreement of September 3, but as being the persons acting on behalf of the limited company. I think, therefore, that on a fair construction of the document it is a good notice to the defendant company.

The plaintiff is therefore entitled to the order for possession for which he asks.

Solicitors for plaintiff: *Woodcock, Ryland & Co., for Louch, Willmott & Clarke, Langport.*

Solicitors for defendants: *Reid Sharman & Co., for Thomas Dodds & Son, Newcastle-upon-Tyne.*

H. A. P.

Distinguished. FERGUSON *v.* WEAVING [1951] 1 K. B. 814

1946 *Jan.* 30, 31.

Lord Goddard C.J., Humphreys and Henn Collins JJ.

LINNETT *v.* COMMISSIONER OF METROPOLITAN POLICE.

Licensing (Intoxicating liquors)—Licensed premises owned and occupied by company—Secretary of company and manager of premises, joint licensees—" Person who shall . . . . keep . . . . any house . . . . " of public resort . . . . wherein . . . . liquors . . . . shall be " sold . . . . and who shall . . . . knowingly permit . . . . dis-" orderly conduct "—" Keep "—No knowledge in fact of disorderly conduct by secretary—Delegation of duty by secretary to co-licensee —Conviction of secretary—Metropolitan Police Act, 1839 (2 *&* 3 *Vict., c.* 47), *s.* 44.

A company owned and occupied premises fully licensed for the sale of intoxicating liquors. The licences were jointly held by L., the secretary of the company, and by B., employed by the company to manage the business carried on at the premises, who was in sole control thereof. L. and B. were each convicted under s. 44 of the Metropolitan Police Act, 1839, as being keepers of a house of public resort, where liquors were sold or consumed, of knowingly permitting disorderly conduct in such house. L. was not on the premises at the material time and, in fact, had no knowledge of the disorderly conduct :—

Held, upholding the conviction of L., that (1.) business having been carried on under the licence, each of the licensees had " kept " the house within the meaning of s. 44, and (2.) since, by virtue of the licence, L. was responsible in law as the " keeper " of the house and had delegated his duties, powers and authority to B., the knowledge of B., although he was not the servant of L., must be imputed to L.

Allen v. *Whitehead* [1930] 1 K. B. 211, applied.

Somerset v. *Hart* (1884) 12 Q. B. D. 360, distinguished.

CASE STATED by the London quarter sessions.

Ward's Irish House, Piccadilly, London, was fully licensed for the sale of intoxicating liquors and owned and occupied by Ward's Catering Co., Ld., who received all the profits thereof. The licences in respect of Ward's Irish House were jointly held by Geoffrey Samuel Johnson Linnett, the appellant, and William Albert Baker. The appellant was employed by the company as its secretary, a salaried servant, and as such and not otherwise he jointly held, on its behalf, the licences of Ward's Irish House and all other licensed premises owned by the company. Baker was employed by the company as manager of the business carried on at Ward's Irish House and he was in sole charge thereof and responsible to the company therefor. The company did not require or expect the appellant to take any part in the conduct or control of any premises in respect of which the appellant was licensed on their behalf.

Between 5.30 p.m. and 11 p.m., the evening "permitted "hours," on November 18, 21, 22, 23 and 24, 1944, there was disorderly conduct at Ward's Irish House. At all material times Baker was on the premises of Ward's Irish House and was in sole control of the business there carried on. The appellant was not at any time on these dates on those premises and he had no knowledge that the alleged or any disorderly conduct had taken place thereon at any time. The appellant and Baker were each convicted at Bow Street Police Court on March 19, 1945, for that they on November 18, 21, 22, 23 and 24, 1944, at Ward's Irish House, Piccadilly, being keepers of a house wherein liquors were sold or consumed did knowingly permit disorderly conduct in such house, contrary to s. 44 of the Metropolitan Police Act, 1839 (1), for each of which offences they were fined 5*l*. The appellant and Baker appealed and the London quarter sessions dismissed the appeals and affirmed each of the five convictions but at the request of the appellant stated this case.

Paull K.C. and *Sidney Lamb* for appellant. By the year 1839, the word "keeper" of premises had acquired a clear meaning, which was stated in s. 8 of the Disorderly Houses Act, 1751, by which "any person who shall at any time "hereafter appear, act or behave him or herself as master or "mistress, or as the person having the care, government or "management of any bawdy-house, gaming-house or other "disorderly house, shall be deemed and taken to be the keeper "thereof . . . ." The same definition appears in s. 2 of the Sunday Observance Act, 1780. There is no other definition of the word "keeper" in any Act of Parliament. A licensee is not a "keeper" of the premises for which he is licensed, merely because he is the holder of the licence, unless he also, in fact, "keeps," i.e., acts as master or manager of the premises. Sections 75-79 of the Licensing (Consolidation) Act, 1910, show that there is a distinction between a mere licensee and a keeper, since those sections set out offences for which the licensee is liable. The material definition of "keeper" in the Oxford English Dictionary is "one who owns or carries on "some establishment or business." The word "keeper" in s. 44 of the Metropolitan Police Act, 1839, cannot refer to a person who was not in any way in charge or control of the premises. Ward's Catering Co., Ld., and their manager, Baker, were the "keepers" of this licensed house and the appellant did not "keep" the house. A licence granted by a licensing authority is a mere permission. It does not connote that the grantee of the licence has undertaken or will undertake any duties. Vaughan C.J. in *Thomas* v. *Sorrell* (1) as Romer L.J. observed in *Frank Warr & Co., Ld.* v. *London County Council* (2), when speaking of the general effect of a licence properly so called, said that "a dispensation or licence "properly passeth no interest, nor alters or transfers property "in anything, but only makes an action lawful, which without "it had been unlawful." See also *Wilson and Another* v. *Crewe Justices* (3). [LORD GODDARD C.J.: Lord Alverstone C.J., in *Wilson's* case spoke of the licence-holder who had not sold liquor under the licence as having "kept" the premises as an inn (4) and Kennedy J., said that there was evidence on which the justices were entitled to find that Wilson had "kept" the premises as an inn (5).]

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(1) By s. 44 of the Metropolitan Police Act, 1839: "Every person "who shall have or keep any house "shop, room, or place of public "resort within the metropolitan "police district, wherein provisions, liquors, or refreshments "of any kind shall be sold or consumed . . . . and who shall "wilfully or knowingly permit "drunkenness or other disorderly "conduct in such house, shop, "room, or place . . . . shall for "every such offence be liable to "a penalty of not more than five "pounds . . . ."

Secondly, the appellant did not "knowingly permit" disorderly conduct at this house of public resort, within the meaning of s. 44. Indeed, he did not permit such conduct, since a man cannot permit conduct if he does not know of it: *Somerset* v. *Hart* (6) and *Somerset* v. *Wade* (7). Except where a master appoints a servant to act on his behalf there can be no permission of an act without knowledge of it. [Humphreys J. referred to *Mullins* v. *Collins* (8). LORD GODDARD C.J.: Why would not a licensee be responsible for the act of his co-licensee in knowingly permitting an act, as he would be if that person were merely his servant in charge and control of the premises?] Because in such a case—in this case—there was no delegation by the appellant of his powers and authority to his co-licensee. The licence was granted jointly to the appellant and Baker and the appointment of Baker to manage the premises was made by the company. [LORD GODDARD C.J.: Then why did the appellant accept the licence?] No doubt, by accepting the licence, the appellant has duties under the Licensing Acts, but once Baker was appointed by the company to manage the premises he had none qua the premises. Co-licensees are not partners: the appellant was not carrying on the business. The permission of the licence was for each person to carry on the business; in fact only one person, Baker, acted on that permission and carried on the business; and there was no delegation of his duties by the appellant to him. If the appellant cannot divest himself of his duties, under the Licensing Act, he can do so with reference to his duties under the Metropolitan Police Act, 1839. It is clear from the judgment of Kennedy J. in *Wilson* v. *Crewe Justices* (1) that the mere fact that a man is a licensee of premises does not mean necessarily that he has "kept" them. [HUMPHREYS J. But if the house has been opened and intoxicating liquor sold there, it must be the licensee, or in the case of joint licensees, both of them, who have "kept" it, because no one else has power to do so.] What the co-licensee Baker did without the knowledge of the appellant was not done on his behalf and should not involve him in criminal liability.

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(1) (1674) Vaugh. 330, 351.
(2) [1904] 1 K. B. 713, 721.
(3) [1905] 1 K. B. 491.
(4) Ibid. 498.
(5) Ibid. 499.
(6) (1884) 12 Q. B. D. 360.
(7) [1894] 1 Q. B. 574.
(8) (1874) L. R. 9, Q. B. 292.

Vernon Gattie for the respondent. [LORD GODDARD C.J. We need not trouble you on the first point.] This case is concluded by the decision in *Allen* v. *Whitehead* (2). The facts in that case were similar to those in this, except that the manager employed by the licensee of the refreshment house was not a co-licensee, and that difference in the facts is irrelevant. In *Somerset* v. *Hart* (3) the licensee and not the servant to whose knowledge gaming had taken place was in charge of the premises. The appellant here accepted the justices' licence and nevertheless accepted the instructions of his company that Baker should manage the premises, thus delegating his powers and duties to Baker. [He was stopped.]

Paull K.C. replied.

LORD GODDARD C.J. The first point taken on behalf of the appellant is that he did not "keep" Ward's Irish House. I find no difficulty in disposing of that issue quite shortly. The licence was a joint licence granted to the appellant and

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(1) [1905] 1 K. B. 491, 498.
(2) [1930] 1 K. B. 211.
(3) 12 Q. B. D. 360.

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Baker, under which these premises were opened and kept open, intoxicating liquor being sold under that licence by the licensees, and only by them, because it could not have been lawfully sold at these premises by any other person. We are not concerned with a case where the licensees had not taken out an excise licence or where nothing had been done under the licence. Intoxicating liquor having been sold at these premises under the licence, in my opinion, it cannot be said that each licensee was not " keeping " the house. Mr. Paull has argued that this licence was a mere permission. In one sense that is true, but if a person, to whom such a licence to sell intoxicating liquor on the premises has been granted, proceeds to sell liquor under that licence, it cannot be said that he is not the person who is " keeping " the premises. No doubt, a person " who " shall . . . . keep . . . . any house . . . . or place of public " resort . . . . wherein provisions, liquors, or refreshments of " any kind shall be sold or consumed " within the meaning of s. 44 of the Metropolitan Police Act, 1839 need not necessarily hold a justices' licence to sell intoxicating liquor, but it is, indeed, difficult to see how a person who holds such a licence in respect of licensed premises, where intoxicating liquor is sold, is not the " keeper " of the premises. Both the appellant and Baker were " keepers " of these premises, and this point fails.

There is a little more to be said about Mr. Paull's other contention. The offence under s. 44 is for the " keeper " of a house of public resort " wilfully or knowingly to permit drunken" ness or other disorderly conduct in such house," and it is found by the case stated that Baker was employed by the owners of the house as manager of the business carried on at the house and was in sole charge of it. At the material times, Baker was in sole control of the business and the appellant was not at those dates on the premises and had in fact no knowledge of the disorderly conduct which took place. Accordingly, it was contended, he could not be convicted of knowingly permitting this disorderly conduct. There are many cases under the Licensing Acts, the Food and Drugs Acts and other Acts in which convictions have been upheld of persons knowingly permitting certain acts, without any actual knowledge by them, the acts having been knowingly permitted by a servant or manager and that knowledge having been imputed to the master or principal. The principle underlying these decisions does not depend upon the legal relationship existing between master and servant or between principal and agent ; it depends on the fact that the person who is responsible in law, as for example, a licensee under the Licensing Acts, has chosen to delegate his duties, powers and authority to another.

A case which at first sight seems to give rise to difficulty is that of *Somerset* v. *Hart* (1). The headnote in the Law Reports is: " Where gaming had taken place upon licensed premises to " the knowledge of a servant of the licensed person employed on " the premises, but there was no evidence to show any con- " nivance or wilful blindness on the part of the licensed person, " and it did not appear that the servant was in charge of the " premises: Held, that the justices were right in refusing to " convict the licensed person of suffering gaming on the " premises under the Licensing Act, 1872, s. 17." That decision seems to me to depend on the fact proved in that case that there was no delegation of his powers and duties of management by the licensed person to his servant. It was a case in which, the licensee being in active personal management of the premises in respect of which he held the licence, his servant had knowledge that gaming took place on the premises which he failed to report to his master. That case seems to me to have no application to one where a licensee entrusts a servant or other person with the sole management and conduct of the licensed premises. Where there is such delegation, then the knowledge of the servant or agent becomes that of the master or principal.

In this case there was no relationship of master and servant between the appellant and Baker. They were joint licensees. If one licensee chooses to say to his co-licensee, although not his servant: " We are both licensees and both keepers of this " house, but I am not going to take any part in the management " of this house, I leave the management to you," he is putting his co-licensee into his own place to exercise his own powers and duties and he must, therefore, accept responsibility for what is done or known by his co-licensee in that exercise. That is the principle which underlies all the cases to which I have referred. I am far from saying, and I do not wish it to be thought that I am saying, that where a statute provides that in any business a certain act permitted by the manager shall be an offence on the part of the manager if it is done with his knowledge, that if that act takes place whilst the manager himself is carrying on that business and is in charge of that business but without his knowledge, so that he was powerless to prevent it, that person necessarily commits the offence. But if the manager chooses to delegate the carrying on of the business to another, whether or not that other is his servant, then what that other does or what he knows must be imputed to the person who put the other into that position. In my view, therefore, quarter sessions came to a right conclusion in this case. I should be sorry to think that where a licence is granted to a man to carry on a business and he opens that business and carries it on under the licence, he does not thereby undertake the responsibilities and duties put on him by statute or that he can evade them by pleading that since another is his co-licensee who is managing the business, and he himself is not going to take any part in the business, therefore his co-licensee is solely responsible. The answer is that by accepting the licence he incurs the responsibility.

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(1) 12 Q. B. D. 360.

The appeal fails.

HUMPHREYS J. I am of the same opinion. On the first point I will only add that it is not merely a coincidence when one looks at s. 1 of the Alehouse Act, 1828, which first instituted the general annual licensing meeting, justices are authorized to hold a meeting " for the purpose of granting licences to persons " keeping or being about to keep inns, alehouses, and victualling " houses " and throughout the series of the Licensing Acts that language persists. The person who is licensed is a person who is the keeper of the house or, if the house is not yet built, a person who desires to become the keeper of the house, when built.

As to the second point, on that, I think the decision in *Allen* v. *Whitehead* (1) is conclusive of this case. That case was decided on the ground, which was the basis of my Lord's judgment in this case, with every word of which I agree, not on any nice question of the law of master and servant or even of principal and agent, but on the ground that a person in the position of a licensed victualler—in that case the licensee of a refreshment house—in certain circumstances may say : " I am " not going to carry on this business myself ; I am going to, " delegate my authority and duty to another." If he does that the licensee is responsible not only for the acts but for the knowledge of the person to whom he has delegated his duty and authority, in this sense that the knowledge of that person is the knowledge of the delegator. The only distinction suggested between the facts in *Allen* v. *Whitehead* (1) and those in the case before the court is that here the person to whom the authority and duty were delegated was a joint licensee with the delegator. That fact cannot excuse the appellant in any way, when he would not have been excused if Baker had not been his co-licensee, and can make no difference to the result in this case. I agree, therefore, that this appeal should be dismissed.

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(1) [1930] 1 K. B. 211.

HENN COLLINS J. I agree. Dealing with the first point, it may be that if a licensee has done nothing under his licence, then he has not become the keeper of the premises to which the licence relates, but when once the business authorized by the licence is carried on from the premises named in the licence, I have no doubt that a holder of the licence is the keeper of the premises. In this case there were two joint licensees, each of whom, as it seems to me, had the advantages conferred, and the obligations imposed, by the licence. The appellant, one of the licensees, said in effect: "I am not going to do anything in "my position as a licensee of these premises: I am going to "leave the work to my co-licensee." He delegated the whole of his powers and obligations under the licence to Baker, the manager of the premises. In these circumstances it is clear by a series of authorities, the last being *Allen* v. *Whitehead* (1) that Baker's knowledge was also that of the delegator—the appellant. In my view, the decision of quarter sessions was correct.

Appeal dismissed.

Solicitors for appellant: *J. E. Lickfold & Sons.*
Solicitor for respondent: *Solicitor to Metropolitan Police.*

(1) [1930] 1 K. B. 211.

C. G. M.

WATSON AND OTHERS *v.* AYTON.

1946
Feb. 6.
Hallett J.

Municipal corporation—Election of borough councillor—Nomination paper—"Validly nominated"—Duty of mayor to decide—Nomination pronounced invalid on ground of disqualification to sit—Jurisdiction—Local Government Act, 1933 (23 & 24 *Geo*. 5, *c*. 51) *Sch. II., para*. 5, *sub-para*. 1.

By para. 5, sub-para. 1 of Schedule II. to the Local Government Act, 1933, it is the duty of the mayor of a borough on the occasion

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of the election of a borough councillor to "examine the nomination "papers, and decide whether the candidates have been validly "nominated in accordance with the provisions of this schedule." The mayor decided that a candidate had not been validly nominated by reason of the fact that he was disqualified for being elected by the provisions of s. 59, sub-s. 2 of the Local Government Act, 1933:—

Held, that the duty of the mayor was limited to deciding the question of the validity of a nomination by an examination of the nomination paper itself and that he had no jurisdiction to decide that a nomination was invalid on the ground that the candidate was disqualified from election.

SUMMONS adjourned into court.

On December 3, 1945, one James Adams, with two other persons, was nominated as a candidate at an election to be held of a councillor to represent the Elizabeth Ward on the borough council of Berwick-upon-Tweed. The nomination papers gave the name, place of residence and occupation of the candidate, which last in the case of Adams was stated to be that of school teacher. By sch. II., para. 5, sub-para. 1 to the Local Government Act, 1933, it then became the duty of the mayor of the borough "to examine the nomination papers and decide "whether the candidates have been vaidly nominated in "accordance with the provisions of this schedule." In the case of the candidate Adams, the mayor decided that he had not been validly nominated, giving as his reason that it was apparent on the face of the nomination paper that he was disqualified from being elected by s. 59, sub-s. 2, of the Local Government Act, 1933 (1). At the election, one J. W. Ayton was declared to have been elected. An election petition was presented against his return, and he, as respondent to the petition, having given notice under r. 47 of the Municipal Corporations General Rules, that he did not intend to oppose the petition, and no other person having been admitted as a respondent, the petitioners took out a summons in chambers by which they applied (1.) that the case raised by the petition, namely, whether the mayor had any right authority or jurisdiction to decide whether or not James Adams was disqualified from being elected a member of the council of the borough, or that he had not been validly nominated, on the ground stated by the mayor, might be stated in the form of a special case, or, alternatively (2.) that the election might be declared void. At the hearing of the summons the petitioners confined their application to the alternative form of relief for which they asked.

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(1) Local Government Act, 1933 s. 59, sub-s. 2: "A paid officer of "a local authority who is employed under the direction of a "committee or sub-committee of "the authority, any member of "which is appointed on the "nomination of some other local "authority, shall be disqualified "for being elected or for being a "member of that other local "authority."

Gerald Gardiner for the petitioners. The mayor had no jurisdiction to decide that the candidate was disqualified from being elected. His function was limited to considering whether the candidate had been validly nominated in accordance with the provisions of sch. II. to the Local Government Act, 1933, which does not deal with the question of the eligibility of a candidate for election, but merely with the form and contents of the nomination papers. In *Pritchard* v. *Mayor, etc., of Bangor* (1), Lord Halsbury L.C. said: " The mayor is the " person who is to determine whether the nomination paper is " good or not. When the mayor has determined that the " nomination paper is good, his functions are at an end." In *Harford* v. *Linskey* (2), where objection was taken to the petitioner's nomination on the ground that he was disqualified from being elected, Wright J. " It is now admitted that " having regard to the case of *Pritchard* v. *Mayor, etc., of* " *Bangor* (1), in the House of Lords, the lord mayor must be " taken to have had no power to entertain an objection of this " kind . . . ." The observations of Wright J. in the last paragraph of his judgment, which appear in some respects to qualify what he had said earlier, were obiter, and in any event would not cover the present case.

HALLETT J. This summons comes before me as one of the judges on the rota for the trial of election petitions. It asks, (1.) that in pursuance of s. 93, sub-s. 7, of the Municipal Corporations Act, 1882, the case raised by the petition may be stated as a special case, and (2.) in the alternative, for an order that the election referred to in the petition may be declared void, pursuant to r. 47 of the Municipal Corporations General Rules made by virtue of s. 100 of the Act of 1882. That rule provides that if all the respondents shall give notice of their intention not to oppose the petition and no other person shall be admitted as a respondent, the High Court or a judge thereof may either declare the election void or direct the trial to proceed. In the present case the respondent has given notice of his intention not to oppose and no other respondent has been admitted. The petitioners, therefore, are only asking for the alternative relief claimed in the summons.

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(1) (1888) 13 App. Cas. 241, 248.

(2) [1899] 1 Q. B. 852, 856, 862.

On December 13, 1945, an election was to be held of a councillor to represent the Elizabeth ward for the borough council of Berwick-upon-Tweed and on or about December 3, four nomination papers in respect of one James Adams were delivered to the town clerk as the returning officer. The only information required to be given on the nomination paper in respect of a candidate was his name, his place of residence and his occupation, which last, in the case of Mr. Adams, was that of a school teacher. By s. 29 of the Local Government Act, 1933, the election of councillors of a borough is to be conducted in accordance with the provisions of sch. II. to the Act. Paragraph 5, sub-para. 1 of that schedule provides that the mayor is to examine the nomination papers and decide whether the candidates have been validly nominated in accordance with the provisions of the schedule. In the present case, on each of the nomination papers of the candidate in question, the mayor endorsed a statement that, having examined them, he decided that the candidate in question had not been validly nominated, giving as his reason that it was apparent on the face of the paper that the candidate was disqualified from being elected or being a member of the council by the provisions of s. 59, sub-s. 2, of the Local Government Act, 1933.

I am told that, in fact, Mr. Adams is a specialist school teacher employed by the Northumberland County Council, but on the face of the nomination papers there was nothing whatsoever to inform the mayor that he was employed by that council or by any other body. I am also told that some of the managers of the schools in Northumberland, which Mr. Adams attends, are appointed on the nomination of the council of Berwick-upon-Tweed, but, again, there is nothing on the face of the nomination papers to give that information to the mayor. As to whether Mr. Adams can be said to be employed under the direction of the managers of the schools which he attends, or whether the managers can properly be regarded as a committee, or sub-committee of the county council, I have no materials to form any opinion, and the mayor can have had no information either.

It would require a careful consideration of the facts and of the law before it would be possible to form any opinion on the questions I have mentioned. How then was it possible for the mayor to decide that on the face of the nomination paper it was apparent that the candidate was disqualified from election or from being a member of the borough council? That, perhaps, is sufficient to dispose of the matter, but I think it may be desirable for me to go a little further since my decision may be of some assistance in future cases.

I wish to make it quite plain that I am not deciding whether, on an inquiry by a proper tribunal Mr. Adams would or would not be held to be disqualified from being elected. The mayor derives his powers in this instance from the provisions of para. 5, sub-para. 1, of sch. II. to the Municipal Corporations Act, 1933, to whch I have all ready referred. The mere words of sub-para. 1 at once raise a doubt whether the mayor is empowered to decide anything which is not revealed by an examination of the nomination paper itself plus such information, for instance, as is contained in the burgess roll which would be at his disposition. What the mayor apparently thought he had power to do was to decide, not whether the candidate was validly nominated, but whether he was disqualified from being elected by the provisions of s. 59, sub-s. 2, of the Act. In my opinion para. 5, sub-para. 1, of the schedule clearly indicates that the mayor is limited to an inquiry into the validity of the nomination paper having regard to the provisions of the schedule. The provision with regard to disqualification on which he relied is not to be found in the schedule at all but in s. 59, sub-s. 2, of the Act, and refers, not to a disqualification from being nominated but from being elected.

I am confirmed in this view when I consider the three following provisions which are to be found in para. 5 of the schedule. By sub-para. 2, if the decision of the mayor is favourable to the validity of the nomination, his decision " shall be final and shall " not be questioned in any proceeding whatsoever." By sub-para. 3, if his decision is unfavourable, " he shall endorse and " sign on the nomination the fact and reasons for his decision " and by sub-para. 4, his decision " under the last preceding sub- " paragraph shall be subject to review on an election petition " questioning the election." The question which the mayor has to decide under para. 5, sub-para. 1, must be the same question whether he decides it favourably or adversely to the nominee. If the mayor can decide the question of his qualification for election in favour of the nominee, then, although on an investigation of the facts and on legal argument it might appear that

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the nominee was quite palpably disqualified from election by the provisions of s. 59, sub-s. 2, of the Act, or by some other provisions, the decision of the mayor, who had no facilities for any such investigation, cannot be questioned in any proceeding whatsoever.

It seems to me impossible to contend that if the mayor decides that the candidate is disqualified for election, the decision is one which can be questioned by a petition, but that if he decides that the candidate is qualified for election, his decision is final, although all he is expressly empowered to decide is whether the candidate has been validly nominated in accordance with the provisions of the schedule. I was referred by Mr. Gardiner to certain authorities which support the view of the mayor's powers which I have expressed. But in *Harford* v. *Linskey* (1) there are some passages in the judgment of Wright J. which perhaps explain the somewhat cautious manner in which the author of Arnold's Law of Municpal Corporations, 7th ed., note B., p. 198, deals with the matter. I do not think, however, that in *Harford* v. *Linskey* (1) the court was considering the same question as I have before me, nor were they there deciding that a mayor was entitled to disallow nominations on the ground on which he disallowed them in this case. For the reasons I have given I must declare this election void.

Solicitor for the petitioners: *E. G. Floyd.*

(1) [1899] 1 Q. B. 852.

P. B. D.

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Nov. 13.

Hilbery, J.

HODGSON *v.* BRITISH ARC WELDING COMPANY, LIMITED AND B. & N. GREEN & SILLEY WEIR, LIMITED.

Master and servant—Liability of sub-contractor for injury to servant—Repairs to ship—Faulty staging—Breach of statutory duty by contractor—Sub-contractor not liable at common law—Shipbuilding Regulations, 1931 (*St. R. & O.* 1931, *No.* 133), *reg.* 11 (*b*).

The plaintiff, who was an electric welder employed by sub-contractors, was injured by falling from a plank while at work in a ship which was under repair in a dock. The reason for the plaintiff's fall was that the plank was warped and twisted and tipped up when he walked along it. The scaffolding and staging in the ship, including that on which the plaintiff was working, had been provided and erected by the contractors for the repair of the ship, who were shipwrights :—

Held, that there was no breach of duty by the sub-contractors at common law, but that there was a breach of the Shipbuilding Regulations, 1931, by the contractors which rendered them liable to the plaintiff in damages, though *semble* they would not have been liable at common law as the plaintiff knew of the defect in the plank.

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ACTION tried by Hilbery J.

The plaintiff was an electric welder employed by the first defendants, the British Arc Welding Co., Ld., who were sub-contracting for the electric arc welding in the course of repairs to a ship, the S.S. *Sampep*. The second defendants, B. & N. Green & Silley Weir, Ld., were the contractors for the repair of the ship and were at the material time in occupation of the ship and of the dock in which she was lying. In the course of their duty as shipwrights, the second defendants provided the necessary scaffoldings and stagings in the ship.

On April 14, 1944, the plaintiff went to No. 5 hold in the ship to carry out certain work which he had been directed to do. There was there a staging which had been erected by the second defendants and which consisted of a plank resting at one end on a cargo batten in the side of the ship and at the other end on a trestle. According to the plaintiff's evidence the plank, on which he had to stand to work, was warped and had a twist in it and the end which rested on the trestle had been wedged to prevent it from tipping. While working at the other end of the plank with a welding instrument with a long trailer flex, he required an extra length, but found that the flex had got caught round the other end of the plank. He thereupon walked along the plank and freed it. As he walked back the plank tilted, the wedge having come loose, and he fell and injured his back.

The plaintiff subsequently brought this action against both the defendants claiming damages for negligence.

Edgedale for the plaintiff.
Marven Everett for the first defendants.
E. Ryder Richardson for the second defendants.

HILBERY J., after stating the facts, continued : In this action, as regards the first defendants, the plaintiff alleges that they are in breach of a common law duty owed by a master

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to his servant. As against the second defendants, he alleges that this accident was due to a breach of the Shipbuilding Regulations, 1931, which were binding on the second defendants as the occupiers of the dock and the ship where he was at work when the accident happened, the regulations being one of the sets of regulations made relating to dangerous trades. Alternatively, as against the second defendants, he says that they were guilty of a breach of their common law duty to him, namely, the duty owed by occupiers of premises to those going on the premises on a matter of business common to both.

On the evidence, I cannot find that any case is made out against the first defendants, the plaintiff's employers. The work in question was to be done by them in premises over which they had no control whatsoever. They were not occupiers of the premises. They were only a firm of contractors employed to do certain work in a ship which was then in the hands of the shipwrights for repairs, and they contracted to do that work for the shipwrights. The evidence is that, in those circumstances, the shipwrights provide the scaffoldings and stagings in the ship required for the work which has to be done in the way of repairs. They are skilled persons in the erection of such things. It is a sensible system, because scaffoldings and stagings inside a ship are not like straightfoward scaffoldings on a building ; there are all sorts of peculiarities of ship construction to deal with. In accordance with the usual custom, the first defendants' workmen, including the plaintiff, found a stage and scaffolding provided by the second defendants, and there was no reason to suppose that it would not be a reasonably safe scaffolding. I think that it is putting the duty of an employer in those circumstances too high to say that an electric arc welding firm, or any other sub-contractor doing a specialized type of work, is under a duty separately to inspect every piece of scaffolding in order to see that what the shipwright has done has been done with proper care and skill. They are not competent, or qualified, to criticize what the shipwright does in the way of erecting a scaffolding. The shipwright is an expert in the matter, whereas the sub-contractors probably know nothing about it. It would be ridiculous to say that the employer in those circumstances was responsible to his workmen, because he, who knows nothing about the erection of scaffoldings, and how to make them reasonably safe, did not inspect with the eye of ignorance the work which was being done with the eye of knowledge and skill. I do not think that there was any breach of duty owed in law by the first defendants which led to this accident. They were not the occupiers of the ship or of the dock. They did not owe the duty which the ordinary occupier of premises owes to somebody coming upon the premises on a matter of business common to that person and to the occupier. They were not under the statutory obligations and regulations, because they were not the occupiers. So far as they are concerned, there must be judgment for them.

So far as the second defendants are concerned, it seems plain on the evidence before me that this plank was not a suitable or safe plank to provide in a scaffolding or staging which was constructed as that one was, and I have not heard that the wedge, or the plank, was secured in any way, or that any step was taken to prevent that wedge from coming out. I am satisfied that the real explanation of the matter is that this work was being done at a time when timber in this country was very difficult to obtain, and, owing to the urgency with which the work had to be done, a chance was taken which would not be taken in ordinary circumstances. A piece of dangerous planking was used, which, in the ordinary course, would not have been used. The result was that the plaintiff fell. The question then arises whether there was a breach of the duty owed in law by the second defendants to the plaintiff at common law or a breach of the statutory regulations, or both. As I read the Shipbuilding Regulations, 1931, I think it is clear that there was a breach of the statutory regulations which, as was pointed out in *Smith* v. *Cammell, Laird & Co.* (1), impose an absolute obligation. Regulation 11 (*b*) of those regulations provides: "All staging shall (i.) be securely constructed of sound and "substantial material and shall be maintained in such con- "dition as to ensure the safety of all persons employed." This plank, being twisted, warped and unsafe, was not, and could not be, maintained in such a condition as to ensure the safety of all persons employed. In my view, the plaintiff succeeds against the second defendants for breach of the statutory duty.

I need not, therefore, decide whether the plaintiff has also established a claim based upon the common law duty. I very much doubt whether he has, because this danger from which he suffered was apparent to him before he went on the plank or used it, and so it was not a danger of which the occupier knew, or ought to have known, but of which the visitor did not know,

(1) [1940] A. C. 242.

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though exercising reasonable care for his own safety. The plaintiff did know of it; he recognized the danger; and, in those circumstances, I do not think that he could succeed on the claim for breach of common law duty. But he does succeed on the breach of the statutory duty and I think that he has established the right to damages to the extent of 235*l*. There must be judgment for the plaintiff against the second defendants for 235*l*. and judgment for the first defendants against the plaintiff.

Solicitors for plaintiff: *Shaen, Roscoe & Co.*

Solicitors for first defendants: *Barlow, Lyde & Gilbert.*

Solicitors for second defendants: *Hewitt, Woollacott & Chown.*

H. A. P.

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Jan. 24, 25.

Lord Greene M.R., Morton and Bucknill L.JJ.

MILMO *v.* CARRERAS.

Landlord and Tenant—Agreement to grant sub-lease for term exceeding head lease—No reversion in sub-lessor—Right of possession lost.

The plaintiff was tenant of a flat under a lease for a term of seven years expiring on November 28, 1944. By an agreement in writing of October 25, 1943, he agreed to sub-let the flat to the defendant for one year from November 1, 1943, and thereafter quarterly until either party should give three months notice. The agreement contained the usual undertaking to deliver up at the determination of the term. The so-called sub-term, by reason of the quarterly extension, would necessarily extend beyond November 28, 1944, when the head lease expired. On April 27, 1945, the plaintiff served on the defendant what purported to be a notice to quit on August 1, 1945. The defendant having refused to give up possession, the plaintiff in these proceedings sought an order for possession:—

Held, that where a lessee by a document in the form of a sub-lease divests himself of everything he has got (which he must do if he is transferring to his sub-lessee an estate as great as or purporting to be greater than his own), the relationship of landlord and tenant cannot exist between him and the so-called sub-lessee. By the agreement of October 25, 1943, the plaintiff had become a stranger to the land. He thereby had transferred to the defendant the whole of the term existing under the head lease and he retained no reversion. Accordingly, he had no right to have possession delivered up to him.

Semble that, although the agreement of October 25, 1943, was

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

not under seal and so did not fulfil the requirements of s. 52 (1.) of the Law of Property Act, 1925, it operated to transfer the legal estate in the head lease to the defendant, as it took effect by operation of law and was accordingly within the exception in s. 52 (2.) (*g*), of the Law of Property Act, 1925.

APPEAL from West London county court.

The plaintiff, Captain Milmo, was the tenant of a flat, No. 4, in a building known as No. 29 and 30 Emperors Gate, Kensington. He held under a lease, dated March 23, 1938, granted by the Haversham Estates for a term of seven years from November 29, 1937, expiring on November 28, 1944 at a rent of 140*l*. a year. The plaintiff was an officer in the Territorial Army and was called up at the outbreak of war. By an agreement in writing, dated October 25, 1943, in the form of a sub-lease, made between the plaintiff and the defendant Colonel Carreras the plaintiff agreed to let the flat to the defendant for one year from November 1, 1943, " and " thereafter quarterly until such time as one of the said parties " shall give to the other three months notice in writing to " expire on the 1st February, May, August or November in any " year." This agreement contained the usual undertaking by the defendant to deliver up possession at the end of the term.

The agreement of October 25, 1943, had been prepared for the plaintiff by the agent of the head landlords, who was under the mistaken impression that the plaintiff's lease began in 1939 and not in 1937 and accordingly that it would expire in 1946. The sub-term, which the agreement purported to grant, would necessarily continue, by reason of the provision for quarterly extension, beyond November 28, 1944, when the plaintiffs lease from the Haversham Estates, in fact, expired.

On April 27, 1945, the plaintiff desiring to occupy the flat himself, served what purported to be a notice to quit on August 1, 1945, on the defendant. The defendant refused to give up possession and in these proceedings the plaintiff claimed possession. Judge Hargreaves took the view that as between the plaintiff and the defendant the hardship caused to the defendant would be less, if an order for possession were made, than the hardship to the plaintiff if an order were refused, he accordingly would have made an order for possession, notwithstanding the provisions of the Rent Restriction Acts, but he held that the plaintiff was not entitled to possession as he had parted with all his interest in the premises. The plaintiff appealed.

Granville Sharp for the plaintiff. The fact that the plaintiff as lessee sublet for longer than the term for which he held the property is not a ground for holding that he cannot recover possession. It is true that when the sub-lease is by deed for the whole original term or longer it operates as an assignment instead of a sub-lease: Woodfall on Landlord and Tenant, 24th ed., p. 381 and *Preece* v. *Corrie* (1) where it was held that the lessee had no right to distrain for rent against his subtenant because he had retained no reversion. It is different when there is a parol agreement to sublet: *Poultney* v. *Holmes* (2). An agreement by parol must rest on intention. *Poultney* v. *Holmes* (2) was questioned in *Barrett* v. *Rolph* (3) but the doubts expressed were only obiter. *Pollock* v. *Stacy* (4) approved the decision in *Poultney* v. *Holmes* (2) but that decision was again doubted in *Beardman* v. *Wilson* (5). In *Doe* v. *Bateman* (6) the lessee's right to re-enter for condition broken was recognized, although he had granted a sub-lease which had operated as an assignment. These authorities show that the particular case before this court has never been decided. Here there is a clear agreement by the defendant as sub-lessee to deliver the premises back to the plaintiff. In all the authorities there was an intention to get rid of the lease. Here the plaintiff never intended to assign and the sub-lease was granted with the knowledge of the landlord's agents. That is an essential feature of the case. In *Wollaston* v. *Hakewill* (7) a sub-lease of part of the premises for a longer term was held to operate as an assignment. That was in an action to enforce a covenant to repair. In the present case, even though the reversion be gone, there is a contractual relationship by which the defendant has undertaken to deliver the demised premises to me and he failed to do so.

[Lord Greene M.R. referred to Platt on Leases, p. 19.]

The present case is distinguished from those authorities where it was sought to distrain. The right to distrain goes with the tenure of the reversion but here the plaintiff is merely seeking to enforce an agreement to render up possession.

Reference was also made to *Parmenter* v. *Webber* (8), *Lewis* v. *Baker* (9) and *Bryant* v. *Hancock & Co., Ld.* (10).

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(1) (1828) 5 Bing 24.
(2) (1721) 1 Strange 405.
(3) (1845) 14 L. J. (Ex.) 308.
(4) (1847) 9 Q. B. 1033.
(5) (1868) L. R. 4 C. P. 57.
(6) (1818) 2 B. & Ald. 168.
(7) (1841) 3 Man. & G. 297.
(8) (1818) 8 Taunt. 593.
(9) [1905] 1 Ch. 46.
(10) [1898] 1 Q. B. 716, 719; [1899] A. C. 442.

M. A. B. King-Hamilton for the defendant. As there is no estate in the plaintiff he is not entitled to claim delivery up. There is no distinction between sub-leases by deed and sub-leases by parol. It is not necessary to have a deed to divest the plaintiff of his estate. The legal estate passed by operation of law to the defendant. If there is a flaw in that argument, the agreement operated as an assignment in equity. If there were no reversion left in the plaintiff, the agreement must operate as an assignment. It is not possible to have a sub-lease unless there is a reversion. None of the authorities justify the statement that any reversion remains in the plaintiff. He is a stranger to the property. The foundation of this action is the service of a notice to quit, such a notice can only be given by a landlord in whom the reversion expectant in the lease is in fact vested when the term ends.

LORD GREENE M.R. stated the facts and continued: The main question, and the only question, to which I need direct my observations arises in this way. It is said that this document, which purports to create a sub-tenancy, must, by the operation of a well known rule of law, be given the effect of an assignment of the residue of the plaintiff's term under the head lease. That being so, it is said the plaintiff had no power to serve any notice; in fact any such notice must necessarily be waste paper, because, on the true construction of the document, it must be a notice to determine a sub-lease which, according to the argument, was non-existent by reason of the fact that the document operated as an assignment of the head term. It is said that nobody but the landlord, in whom the reversion was vested, would be entitled to obtain an order for possession against the defendant, and that the only people who could maintain such an action, apart from the Rent Restrictions Act, would be Haversham Estates, their position being that of head landlords under a lease which had come to an end on November 28, 1944, and as against them, apart from the Rent Restrictions Act, the defendant would have no title to remain when that term expired.

We have had a very interesting and careful argument from Mr. Granville Sharp, who has referred us to a number of authorities bearing on the question of what is the effect of a document purporting to be a sub-lease, which, in fact, purports to create a sub-term equal in point of time, or greater in point of time, than the residue of the head term. There have been

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many cases in which the effect of such a document has been considered, and a controversy has existed as to whether such a document must be described as an assignment, or whether it can properly be described as a sub-lease. I do not propose to examine those authorities; they are to be found dealt with at length in all the text-books, and perhaps the most convenient and authoritative reference that I can give with regard to them is to be found in Platt on Leases (vol. 1, pp. 9-19). There are ten pages of discussion of the earlier authorities. It is perhaps worth mentioning that in certain old authorities which suggested, and, indeed, held, that certain transactions could be described as sub-leases, the substantial question was this: if they were assignments, s. 3 of the Statute of Frauds would have made them void, and the court was concerned to give some effect to such transactions, notwithstanding that they purported to create a term which extended beyond, or was coincident with, the head term. The court was anxious to avoid the rigours of s. 3 of the Statute of Frauds. But it is important to notice what effect was in fact given to the transactions considered in those decisions. I may say in passing that they have been very severely criticized—and it is very doubtful whether they can be considered as law, in so far as they assert that a lease can exist where there is no reversion left under it in the grantor. But they do not go further than this, I think: they accept the position that one of the most ordinary incidents of a lease, namely, the right to distrain for rent, does not exist in such a case. There is no right of distress, but they do say, for example, that the right to sue on the covenant to pay the so-called rent exists. Some of them went further than that and affirmed the right to sue on other covenants. I think I am right in saying that not one of them is based on the view that in the case of such a transaction there is any reversion left in the so-called sub-lessor. Whether you call such a document a lease or not seems to me, in these cases, to have been largely a matter of words, and I do not propose to discuss the question whether they are right or wrong. For the purposes of this case, I think it is sufficient to say that, in accordance with a very ancient and established rule, where a lessee, by a document in the form of a sub-lease, divests himself of everything that he has got (which he must necessarily do if he is transferring to his so-called sub-lessee an estate as great as, or purporting to be greater than, his own) he from that moment is a stranger to the land, in the sense that the relationship of landlord and tenant, in respect of tenure, cannot any longer exist between him and the so-called sub-lessee. That relationship must depend on privity of estate. I myself find it impossible to conceive of a relationship of landlord and tenant which has not got that essential element of tenure in it, and that implies that the tenant holds of his landlord, and he can only do that if the landlord has a reversion. You cannot have a purely contractual tenure. Tenure exists by reason of privity of estate. That seems to me to be the effect of all the decisions, and that position is recognized by all the decisions.

We have, therefore, this position arising in the present case. After the execution of this document, subject to a point I will mention later, the plaintiff became a stranger to the land. He had no estate in the land, the whole estate which he had held under the head lease passed to the defendant, and from that moment onwards, although some contractual relationship might still remain between him and the defendant, in the sense that perhaps he could have sued for the so-called rent, he no longer had any connexion with the flat in the capacity of landlord. His case is this: he says " Under this document I had " power to bring the so-called term to an end." That seems to me to be quite unarguable, because there never was a term. All that the document did, and could do, was to transfer to the defendant the whole of the plaintiff's then existing term under the head lease. The obligation to deliver up in the so-called sub-lease cannot be construed to be a mere contractual obligation as between the plaintiff personally as an individual and the defendant. I think that is clear, when the document is examined. In it the plaintiff, by a definition clause, is called the landlord " which expression shall include the person or " persons for the time being entitled to the reversion " immediately expectant on the term hereby created." The document did not create a term because in law it was incapable of doing so. The habendum is " To hold unto the tenant from " the 1st November, 1943, for a term of one year and thereafter " quarterly until such time as one of the said parties "—the parties being the landlord which includes the plaintiff and the person entitled to the reversion—" shall give to the other three " months notice in writing to expire," and so on. I ask myself: how could any document bring to an end at any time a non-existent term? It seems to me impossible to make that clause work in such a way as to have any kind of contractual force, having regard to the effect which the law requires to be given to this document. Then there is a covenant by the tenant

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to deliver up at the termination of the term, and that is expressed to be a covenant with the landlord, the definition of which I have read. The term never existed, and to whom is he to deliver up? I can give no other construction to this covenant than that he should deliver up to a person having the reversion at the time of the expiration of this alleged term, and whatever other thing may be said about the position of the plaintiff, he was not a reversioner under this lease. He was a stranger to the land once he had parted with the whole of the estate vested in him. I cannot see how, in view of the effect which the law compels us to give to this document, it is possible to find any right in the plaintiff to have possession delivered up to him. The position would appear to be that, when this document was executed, the defendant became the assignee of the plaintiff's term. He became, therefore, tenant of the Haversham Estates under the head lease which expired on November 28, 1944. When that expired, subject to the Rent Restrictions Act, he was bound to deliver up possession to Haversham Estates. I have not seen the head lease, so I do not know what the exact terms of it are, but, apart from anything special, that, as it appears to me, would be the position.

One point did arise for discussion as to the precise position of the plaintiff, and it arose in this way. It became necessary to consider whether, in view of s. 52 of the Law of Property Act, 1925, this document could have effect as an assignment. Section 52, which took the place of s. 3 of the Statute of Frauds, and s. 3 of the Real Property Act, 1845, provides that: "All "conveyances of land or of any interest therein are void for the "purpose of conveying or creating a legal estate unless made by "deed." Then there are certain exceptions, one of the exceptions being conveyances taking effect by operation of law. It is said, and the learned editor of the last edition of Woodfall's Law of Landlord and Tenant (24th ed., p. 841, note D), appears to be inclined to take the same view, that that exception of conveyances taking effect by operation of law would apply to such a case as this, and that there would be no need for the document to be under seal, in order that it should operate as an assignment of the legal estate, because that operation was given to it by a rule of law. It is not necessary, in my view, to say whether that is right or wrong, although the argument seems to be an attractive one. Assuming that the exception does not apply, and none of the other exceptions appear to apply, and that the opening words of this sub-section are alone to be considered, all that they provide is that a conveyance is to be void (unless by deed) for the purpose of conveying the legal estate.

Giving that provision full force in the present case, it does not, of course, mean that this document would not operate in equity as an agreement to give to it the effect which ought to be given to it. Having regard to the fact that, treated as an agreement, it is an agreement to create a so-called sub-term extending beyond the length of the head term, it can be only construed and given effect as an agreement to assign the head term, and an agreement of which specific performance could have been obtained. The position, therefore, would merely be that the plaintiff would have been trustee for the defendant of the residue of the head term, and could have been compelled to assign it so as to give the defendant, not merely a right in equity to get the term from the plaintiff, but so as to give him the legal term. It is obvious that if that be the true position, the plaintiff cannot be in the position of landlord of the defendant. His position would be that of a person who has contracted to assign a lease which is vested in him ; in other words, he would be merely a vendor of the head lease and not the landlord under a sub-lease. Therefore, even assuming that s. 52, sub-s. 1, does have the effect of avoiding this document as a conveyance of the legal estate, the result, in my opinion, is not different from what it would have been if it had been effective.

In my opinion, to sum up, the plaintiff by this unfortunate document divested himself of the entirety of his interest in the flat, and he was thenceforward a stranger to it. He had no power either to give a notice to determine a non-existing term, and thereby confer upon himself the right to resume possession, nor had he any right to call upon the defendant to deliver up possession to him, and in any event he was not the person who, under the language of this document, was the person entitled to call for possession. Therefore, even if this document was to be regarded as having some purely contractual validity on its true construction, I can find no contractual obligation on the defendant to deliver up possession to the plaintiff. The appeal therefore, must be dismissed.

MORTON L.J. There can be no doubt that when the plaintiff and the defendant signed the agreement of October 25, 1943,

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they both intended that, in the circumstances which have in fact arisen, the plaintiff should have possession of this flat. I share the sympathy which the Master of the Rolls has expressed for the plaintiff's position. Having been for over five years on active service, he now desires to occupy the flat with his wife and child. It is perhaps regrettable that this very technical point should have been taken by the defendant. However, as it has been taken, we simply have to decide whether it is good in law or not. I entirely agree that it is a good point in law, and that this document has the effect which the Master of the Rolls has stated.

I agree so entirely with the judgment which has been delivered that I only desire to add two very short comments. I do not myself see how the relationship of landlord and tenant can possibly exist unless the so-called landlord has a reversion. In so far as any of the cases cited to us suggest that that relationship can exist, in other circumstances, I do not think the decisions were well founded, and I agree with the comments which the Master of the Rolls has made upon them. With regard to the provisions of s. 52 of the Law of Property Act, 1925, it is not necessary to express a concluded view whether the document in question in this case did, or did not, operate to convey a legal estate. But for my part, I am disposed to share the view expressed by the learned editor of Woodfall's Law of Landlord and Tenant (24th ed., p. 841, note D), that it did operate to confer a legal estate. Prima facie it seems to me that this is a case in which, within the meaning of the Law of Property Act, 1925, a conveyance has taken effect by operation of law. I agree that the appeal must be dismissed.

BUCKNILL L.J. I agree.

Appeal dismissed.

Solicitors for the plaintiff: *Powell, Skues & Graham Smith.*
Solicitors for the defendant: *King-Hamilton & Co.*

MILLS & ROCKLEYS LIMITED *v.* LEICESTER CITY COUNCIL.

1946
Jan. 28, 29.

Lord Goddard C.J., Humphreys and Henn Collins JJ.

Local government—Planning scheme—Interim development order—Prohibition of use of wall of house for advertising—Validity—Town and Country Planning Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 48), *s.* 47—*Town and Country Planning* (*Interim Development*) *Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 29), *s.* 5.

The Town and Country Planning Act, 1932, is wide enough to enable a local authority, in preparing a scheme under that Act, to protect a part or the whole of their district with regard to advertisements and under s. 47 of that Act the local authority may then require to be taken down or may otherwise deal with advertisements which have been put up and are unsightly or unsuitable. But by s. 47, sub-s. 8, of that Act a scheme is not to contain any provision prohibiting or controlling the erection or use of structures for the purpose of advertising and that provision is not affected by anything in the Town and Country Planning (Interim Development) Act, 1943.

Where, therefore, the owners of a house in an area in respect of which a scheme was in course of preparation painted an exterior wall of the house with a view to its use for the display of advertisements and the local authority in pursuance of s. 5 of the Act of 1943, served on them a notice that such use was prohibited on the ground that it was a development contrary to an interim development order made by them :—

Held, that the order was bad and must be set aside.

CASE STATED by Leicester city justices.

At a court of summary jurisdiction sitting at the Town Hall, Leicester on February 27, 1945, a complaint was preferred by Mills & Rockleys, Ld., advertising contractors, against the Leicester City Council that the council, acting as interim development authority, had, pursuant to s. 5, sub-s. 1 of the Town and Country Planning (Interim Development) Act, 1943 (1), served on them a notice of their intention to make an order prohibiting the use of the external wall of a dwelling-house known as 320 Narborough Road, Leicester, for advertising purposes. The complaint was preferred by way of appeal against the intended order pursuant to s. 5, sub-s. 2, of and sched. I. to the above-mentioned Act.

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(1) Town and Country Planning (Interim Development) Act, 1943, s. 5, sub-s. 1 : " If while a resolu-" tion to prepare or adopt a scheme " under the principal Act is in force " with respect to any area, any " development of land within that " area is carried out . . . otherwise " than in accordance with the terms " of the interim development order " or of permission granted under " that order then . . . the interim " development authority may, if " they are satisfied that it is necess-" ary or expedient so to do having " regard to the provisions then pro-" posed to be included in the scheme " . . . . (*b*) where the development " consists of any use of the land " or any building thereon, by order " prohibit that use . . . . "

Town and Country Planning Act, 1932, s. 47, sub-s. 8 : " Save as pro-" vided by this section, a scheme " shall not contain any provision " prohibiting or controlling the erec-" tion or use of structures for the " purpose of advertising . . . . "

At the hearing the following facts were proved. The council were the local authority for the City of Leicester for the purposes of the Town and Country Planning Act, 1932, and the interim development authority for that city under the Act of 1943. On April 30, 1935, the council, acting under s. 6 of the Town and Country Planning Act, 1932, resolved to prepare a scheme relating to the area in which the complainants' dwelling-house was situated and that resolution was on December 7, 1935, duly approved by the Minister of Health. The complainants were advertising contractors and became the owners of the dwelling-house in question by purchasing it in December, 1943, since when they had used it solely as a dwelling-house. In July, 1944, the complainants painted on the exterior wall of the house two white panels, each twenty feet by ten feet, with the intention of displaying advertisements thereon. On October 31, 1944, the council passed a resolution that certain areas, including the area within which the complainants' dwelling-house was situated, were proposed to be protected in respect of advertisements in the scheme to be prepared under the Town Planning Acts. On November 29, 1944, the council resolved that it was intended to make an order that "the interim development authority do hereby prohibit "the following development, namely, the use of the external "wall facing towards Haddenham Road of the dwelling-house "known as 320 Narborough Road, Leicester, for advertising "purposes." On November 29, 1944, the Town Clerk served a notice on the complainants that the interim development authority prohibited the use of the house for advertising on the grounds that a resolution to prepare a scheme under the Act of 1932 was in force and that the above-mentioned development was not in accordance with the terms of the interim development order. On December 22, 1944, the complainants served on the council a notice of objection.

It was contended for the council that they were entitled to make the order which they had made and that the powers given by s. 47 of the Act of 1932 did not limit their powers under s. 5 of the Act of 1943.

It was contended for the complainants that the Act of 1943 merely gave to the interim development authority the right to exercise such powers as they might have under the scheme when in force and did not extend such powers, and that neither the council nor the justices had any power to prohibit the advertisements in question.

The justices held that the painting of the wall was a "development" within the meaning of s. 5 of the Act of 1943, and that the operation of that section was not limited or affected by s. 47 of the Act of 1932. They therefore decided that the council were entitled to take the proposed action on the grounds specified in the notice and dismissed the appeal.

The complainants appealed.

Lyons K.C. and *Stimpson* for the complainants.

R. Willis for the council.

LORD GODDARD C.J. The Town and Country Planning (Interim Development) Act, 1943, provides by s. 15 that that Act and the principal Act (the Town and Country Planning Act, 1932) may be cited together as the Town and Country Planning Acts, 1932 and 1943. It does not say in so many words that they are to be read together, but they are to be cited together and the Act of 1932 is the principal Act. One has to see in the first place whether any provisions of the principal Act are repealed or amended by the later Act. Certain provisions of the principal Act are repealed by s. 2 of the Act of 1943, but s. 47, which deals with the powers of the planning authority with respect to advertisements, is not, so far as I can see, affected in any way. Apparently there is no provision in that Act dealing expressly with the inclusion in a scheme of provisions with regard to advertisements, but I think the Act is wide enough to enable a local authority, in preparing a scheme, to say that a part, or the whole, of their district is to be protected with regard to advertisements. In other words, it gives them power to take proceedings and exercise the powers given by s. 47 in regard to advertisements which are unsightly or unsuitable in any part of the district which they like to specify. There is no question here but that Narborough Road, Leicester, is a district which has been protected so far as advertisements are concerned, and under s. 47, if an advertisement which can be objected to on æsthetic grounds, or on the ground that it affects the amenities of the district, is put up, the local authority can require that it shall be taken down or, if the owner does not take it down, they can get an order from the court and recover the expenses of taking it down from the person who ought to have done so. Sub-section 5 of that section enables the authority to authorize advertisements subject to conditions, but it is impossible to read that sub-section as authorizing the local authority to prohibit advertisements, which is the very antithesis of authorizing them.

Then in sub-s. 8 it is provided that, save as provided by that section—that is to say, saving the right of the authority to object to a particular advertisement once it is up—" a " scheme shall not contain any provision prohibiting or " controlling the erection or use of structures for the purpose of " advertising." These words seem to me as clear as any words can be. They indicate that Parliament has chosen to put advertising space or sites in a peculiarly favourable position. That is no doubt a very valuable privilege which is given to advertising. It may be that Parliament considered that sufficient protection was given to the neighbourhood by the powers of the local authority to object to particular advertisements and to impose conditions on the use of advertising stations. But it is perfectly clear that a scheme must not contain a provision which prohibits or controls, otherwise than is provided in the section, the erection or use of structures for the purpose of advertising. That is just what the interim order in this case does, since it prohibits the use of this particular wall as an advertising station.

I can find nothing in the Act of 1943 which refers to s. 47 of the Act of 1932 or which cuts down or limits the emphatic prohibition contained in sub-s. 8. Section 5 of the Act of 1943 in effect says that where the authority is preparing a scheme (which will afterwards have to be approved by the Minister before it becomes finally binding), and an interim order is made, no one is to carry out the development of land or put land to a particular use in a manner which is contrary to the provisions of that scheme. In other words, prevention is better than cure. Where the local authority is getting out a scheme, they are not going to have, Parliament says, builders and owners of property developing their land contrary to the ideas contained in the scheme merely because the scheme has not yet been finally approved. The section accordingly enables the authority, where the development consists of any use of the land or any building thereon, by order to prohibit that use. That is what the local authority has purported to do in the present case. But since there is nothing in that section which affects s. 47 of the Act of 1932, it follows that an interim scheme prepared by a local authority, which is an interim scheme under the Act of 1943, must not contain any provision prohibiting or controlling the erection or use of structures for the purpose of advertising. It is useless to inquire why that special privilege is given to advertising. The statute clearly does give it, and if the scheme does prohibit something which the statute says is not to be prohibited, the owner has a right to complain to the court and ask for the order to be set aside.

The order of the magistrates in the present case seems to me not to have given effect to sub-s. 8, because they have in terms prohibited the owners of this property from using it as an advertising station in spite of the clear provisions of the sub-section. Mr. Willis had to base his argument mainly on the use of the word " structure " in the sub-section and to say that it does not apply to the wall of a house. I cannot understand that argument. A " building," by the definition section of the Act, includes a " structure " and therefore things which would not ordinarily be called buildings are included in that term where it is used in the Act. But to say that a wall is not a " structure " seems to me to be impossible. I can see no ground for saying that the use of a wall as an advertising station is not the use of a structure and therefore can be prohibited under the Act.

There is another prohibition contained in the Act of 1932, namely, the provision in s. 12, sub-s. 3, which prevents a scheme from applying to agricultural land. So there are, at any rate, two things which the Act says are not to be included in a scheme at all, namely, agricultural land and advertising stations. Therefore, if a scheme does include provisions regarding agricultural land or advertising stations, so far as they are concerned the scheme is bad and cannot be enforced.

For these reasons, in my opinion, the justices came to an incorrect conclusion and this appeal must be allowed. The relief asked for in the complaint filed before the justices must be granted and the notice of November 29, 1944, served on the company must be set aside.

HUMPHREYS J. I agree that this appeal should be allowed and the order prohibiting the use of the wall for advertising purposes set aside. I do not desire to add anything to the judgment of my Lord, with which I entirely agree.

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HENN COLLINS J. I agree. I think the fundamental question is whether the Act of 1943 has enlarged the ambit of schemes or the powers to make schemes in respect of advertisements beyond the provisions of the principal Act of 1932. The Act of 1943 provides, by the interpretation section, s. 14, sub-s. 3, that any reference in that Act to the principal Act is to be construed as a reference to that Act as amended by the Act of 1943. There is no express amendment of the Act of 1932 in regard to advertisements and therefore prima facie, when the Acts are to be read together, the governing Act is the principal Act. The controlling words of s. 5 of the Act of 1943, under which the order complained of was made, seem to me to be those in the latter part of sub-s. 1, namely, that the authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions so proposed to be included in the scheme, prohibit the use of the land, etc., because one cannot conceive that they could find it necessary or expedient to include in the scheme anything which they had no power to include. One is therefore thrown back on the principal Act and one has to ascertain whether under the principal Act they could make an order prohibiting the use of the side of a dwelling-house for the purpose of an advertisement. The principal Act specifies in s. 11 certain things which must be included in a scheme and in s. 12 certain things which may be included, and there is, for the purpose of this case, a provision in s. 47, sub-s. 8, as to a particular matter which must not be included. Reading the two Acts together, it is clear that an order prohibiting the use of the side of this particular dwelling-house for the purpose of advertising could form no part of the scheme and that the order made is not one which could properly have been made under the Acts.

Appeal allowed.

Solicitors for the company: *Field Roscoe & Co., agents for Stone & Co., Leicester.*

Solicitors for the local authority: *Field Roscoe & Co., agents for Town Clerk, Leicester.*

H. A. P.

BRISTOW (H.M. INSPECTOR OF TAXES) *v.* WILLIAM DICKINSON & COMPANY, LIMITED.

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Feb. 18, 19.

Lord Greene M.R., Somervell and Cohen L.JJ.

Revenue—Income tax—Assessment—Trade debt—Deduction from profits as bad debt—Subsequent payment in respect of debt—Inclusion as trading receipt in year paid—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D., Cases I. & II., r.* 3 (i.).

A company trading as exporters of coal to customers in Spain included debts due from customers in its profit and loss account for the years ended March 31, 1936 and 1937. Subsequently owing to the Spanish Civil War, the debts were, first in part and afterwards as to the remainder, allowed to be deducted as bad debts from trade profits in computing the company's liability to income tax for the years ending April 5, 1938 and 1939 respectively. In the years ending March 31, 1941 and 1942 respectively the company unexpectedly received payments in part of those debts. The question arose whether these payments were trading profits of the years when they were received and accordingly chargeable to income tax in the financial years ending April 5, 1942 and 1943 respectively:—

Held, that the sums so received ought to be treated as trade profits for purpose of taxation to income tax. In view of what happened, it could not be said that the cash payments had been previously brought into account for taxation as debts.

Dictum of Lord Porter in *Absalom* v. *Talbot* [1944] A. C. 204 applied. Decision of Privy Council in *Gleaner Co.* v. *Assessment Committee* [1922] 2 A. C. 169 not followed.

The practice of the revenue authorities in allowing deductions in respect of bad debts in years after the debts were brought into account for taxation was justified under the Income Tax Act, 1918, Sch. D., Cases I. & II., r. 3 (i). The view to the contrary expressed in *Gleaner Co.* v. *Assessment Committee* (supra) not followed. Dicta of Lord Simon L.C., Lord Atkin and Lord Porter in *Absalom* v. *Talbot* (supra) applied.

APPEAL from the decision of Macnaghten J. on a special case.

In the course of their trading William Dickinson & Co., Ld., for many years exported coal and coke to customers in Spain. In the period December, 1935, to March, 1936, debts amounting to 9,915*l.* became owing to the company by customers in Spain for goods so exported and in the period April 1936, to June, 1936 this indebtedness was increased by 984*l.* These sums were credited in the company's general coal account for the company's financial years ended March 31, 1936, and March 31, 1937 respectively.

The Spanish Civil War commenced on July 27, 1936, and the directors of the company in considering the company's financial position as at March 31, 1937, estimated these debts as bad to

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the extent of 4,000*l*. and debited this sum in the company's general profit and loss account as "provisions for bad and "doubtful debts." As at March 31, 1938, the directors debited a further sum of 6,710*l*. The difference between the total debts of 10,897*l*. and the sum amounting to 10,710*l*. debited in the accounts consisted of freight charges.

In computing the company's liability to income tax for the years ended April 5, 1938, and April 5, 1939, the above sums of 4,000*l*. and 6,710*l*. were respectively allowed as deductions. In 1940 the British Government advanced a sum of 2,000,000*l*. to the Spanish Government to facilitate the payment of debts owing by Spanish nationals to traders in this country, and a clearing house for Spanish debts was set up. In the company's years ended March 31, 1941 and March 31, 1942, the company recovered sums of 5,115 9*s*. 0*d*. and 3,333*l*. 3*s*. 11*d*. respectively through the clearing house in respect of the aforesaid Spanish debts and these sums were credited to the company's general profit and loss accounts for these respective years as "transferred from reserve for bad and "doubtful debts no longer required."

At a meeting of the Commissioners for the general purposes of the income tax for the City of Newcastle-upon-Tyne held on May 21, 1943, the company appealed against assessments to income tax of 35,500*l*. for the year ended April 5, 1942 and 25,000*l*. for the year ended April 5, 1943, made in respect of their profits as coal and coke exporters under Case I. of Sch. D of the Income Tax Act, 1918. These assessments were questioned in so far as they included the sums recovered in the years ended March 31, 1941 and March 31, 1942, in respect of the debts incurred prior to those years.

It was contended that these sums so recovered were not trading profits of the years when they were recovered, and that the sums written off in respect of debts estimated as bad in the conditions obtaining at March 31, 1937 and 1938, could not be charged to income tax for any subsequent year in which sums, wholly or in part, were recovered.

The Commissioners upheld the company's contentions but Macnaghten J. reversed this decision holding that the payments received from the clearing house ought to be included in the assessments made upon the company. The company appealed.

Grant K.C. and *Charlesworth* for the company. It is well settled that a debt for goods supplied must be brought into account as profits of the business in the year it arises. Under r. 3 (i.) of the rules applicable to Cases I. and II. of Sch. D. to the Income Tax Act, 1918, deductions in respect of bad and doubtful debts are permitted but there is no provision permitting a debt so written off afterwards proving to be good in whole or in part to be brought into account when payment is received. The Crown is in effect seeking to put the taxation of trade profits on a cash receipts basis. Whether or not it would be logical to allow the unexpected payments to be treated as profits of the year when they are received, there is no statutory provision enabling this to be done and to do so would be contrary to the decision in *Gleaner Co.* v. *Assessment Committee* (1). The Crown's contention only receives support from dicta in *Absalom* v. *Talbot* (2) but they ought not to be applied. [They also referred to *Lock* v. *Jones* (3) and *Anderton & Halstead, Ld.* v. *Birrell* (4).] [Lord Greene M.R. This is not a case of correcting a mistaken assessment as in *Anderton & Halstead, Ld.* v. *Birrell* (4).] The payments received were in respect of the debts which had been brought into account as profits arising from the sale of coal years before and whatever happened afterwards they could not be treated as profits when the debts were paid.

Sir Frank Soskice, S.-G. and *R. P. Hills* for the Crown were not called upon.

Lord Greene M.R. Put in diagrammatic form, so to speak, the question here may be thus formulated. A trading company in the year 1 sells goods on credit. The amount so owing to it is brought into account in the computation of its profits and gains for the year 1. In the years 2 and 3 events happen which, first of all, depreciate the value of that debt, and later on destroy its value altogether. In the accounts for the years 2 and 3, the Revenue accept the view that the depreciation and final devaluation of the debt should be made the subject of an allowance in those respective years. In the year 4 further events happen of a quite unusual and, indeed, unexpected nature, which have the effect of converting the debt, which has been treated as bad, into a perfectly good debt which is paid in the year 4. The Revenue then says:

(1) [1922] 2 A. C. 169.
(2) [1944] A. C. 204.
(3) (1941) 23 Tax Cas. 749.
(4) [1932] 1 K. B. 271.

"In taking the account of your profits and gains for the "year 4, you must bring in that sum as a receipt. You have "received it in the year 4, and you must accordingly bring it "into account. It is not a question of revising or amending, "by additional assessment or otherwise, any of the assess"ments for the years 1, 2 or 3."

The only statutory provision which bears on this question to which I need refer is r. 3 (i.) of the rules applicable to Cases I. and II. of Sch. D. to the Income Tax Act, 1918. Rule 3 provides: "In computing the amount of the profits or gains "to be charged, no sum shall be deducted in respect of . . . . "(i.) any debts, except bad debts proved to be such to the "satisfaction of the commissioners and doubtful debts to the "extent that they are respectively estimated to be bad." Then there is a provision as to bankruptcy or insolvency: "In the "case of the bankruptcy or insolvency of a debtor, the amount "which may reasonably be expected to be received on any such "debt shall be deemed to be the value thereof." There is one curious point about that provision which I note in passing. It finds its place in a series of sub-rules, all of which appear to deal with deductions, such as disbursements, expenses or losses, whereas this particular sub-rule first prohibits the deduction of any debts. A debt would obviously only be the subject of deduction if the taxpayer was entitled to say to the Revenue: "Although I keep my profit and loss account on the basis "of treating debts as being equivalent to receipts, yet as "between me and the Revenue I am entitled to deduct "debts because I have not yet been paid." The effect of the rule is to treat the account, which has to be taken for income tax purposes, on the same basis as a commercial account, and to prohibit the deduction of debts which otherwise might be claimed on the ground that they still remain to be paid and consequently ought to be brought into account in the year in which they are paid. The practice always has been, and rightly, having regard to that language, to treat debts in the ordinary commercial way, as though they were receipts of the year, and bring them into the account accordingly.

The first question which falls to be decided in examining this matter is one on the true construction of that sub-rule. In *Gleaner Co.* v. *Assessment Committee* (1), a case in the Privy Council on appeal from Jamaica arising out of the Jamaican income tax law, it is said that a provision similar in terms to this

(1) [1922] 2 A. C. 169.

one did not justify the giving of an allowance in respect of a doubtful or bad debt save on the occasion when the debt was first brought in to the account. Thus the reasoning of that decision, if it had applied to the present case, would have resulted in the allowances granted by the Revenue in years two and three being unauthorized by the language of this sub-rule. The allowances could only have been made in respect of the debt in the year one. In the year one there was no ground at all for writing down the debt, much less for treating it as altogether bad, and, therefore, nothing fell to be done about it. The consequence would have been, if that view applied, that the allowances granted by the Revenue in the years two and three would have been merely voluntary allowances not made pursuant to any provision of the statute. It was further said in that case (1): " If, therefore, debts decided to be doubtful in one " year were found to be good at a later date, apart from the " provisions of s. 30 "—that is of the Jamaican Act—" there " are no means whatever of obtaining further income tax upon " the amount, nor if their value further diminish, could they " be the subject of re-assessment." That language, if it were applicable to the present case, would preclude the Crown from maintaining the claim it now makes, namely, to have the receipt in the year four brought into account in respect of that year. But in the recent case of *Absalom* v. *Talbot* (2) in the House of Lords, the effect of sub-r. (i.) was considered in that connexion. It is right to say that the observations to which I am about to refer were by way of dicta only. But of the five noble and learned Lords who were sitting on that appeal, three, namely, Lord Simon L.C., Lord Atkin and Lord Porter, emphatically and clearly dissented from the view which had been expressed by the Privy Council in the *Gleaner* case (3), and held by way of dictum only that it was legitimate for the Revenue to make allowance in a subsequent year in respect of a debt which, in the earlier year, had been treated as a perfectly good debt. The other two noble and learned Lords, Lord Thankerton and Lord Russell of Killowen, appear to have been inclined to take the opposite view, although they did not express any concluded opinion. We have, therefore, three clearly expressed statements in that case as to the true construction of this sub-rule. We are not bound, of course, to follow them. I think it falls to us to decide whether, in our opinion,

(1) [1922] 2 A. C. 175.
(2) [1944] A. C. 204.
(3) [1922] 2 A. C. 169.

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those expressed opinions are in accordance with the true meaning of the sub-rule. If we came to the conclusion that they were not, and that the view of the Privy Council in the *Gleaner* case (1) was preferable, the result of this case might well have been different because then the allowances would have been ex gratia allowances. But, in my opinion, the views expressed by those three members of the House in *Absalom* v. *Talbot* (2) are correct. I think I am right in saying that no one of the three noble and learned Lords thought it necessary to examine carefully the language of the sub-rule, in order to show how and why the construction of it admitted the making of such allowances as we have to consider in this case. But it seems to me that this task is not really a difficult one. The language starts, first of all, by prohibiting a deduction in respect of a debt. That would appear to mean, as I have said, that a taxpayer cannot come and say: "Exclude this debt from the computation because "it has not yet been paid." But in this case, in the years two and three the company was in effect saying to the Revenue: "We claim a deduction in those two years in respect of this "debt; the reason being that in those years two and three "something has happened which has had the result, first, of "reducing it in value, and, subsequently of destroying the value "altogether." The company claiming to make that deduction in respect of the debt in the years two and three is then entitled to the relief which the sub-rule allows, namely, that, if it is proved to be a bad or doubtful debt to the satisfaction of the Commissioners, a deduction may be made. That is exactly what happened.

The contrary view, of course, is that the only occasion when the question of badness or doubtfulness of debts falls to be considered is the occasion when the debtor is bringing his debt into the account. But I cannot see that the language of this sub-rule necessarily leads to that result. It applies to any deduction claimed in respect of any debt, at any time in any year it seems to me, and such a claim was precisely the claim that was made by the company in this case. I am accordingly of opinion that we ought to follow the dicta of the majority of the House in *Absalom* v. *Talbot* (2). That is the first question to be considered.

The next question is: what is to be done where, in a subsequent year, the debt becomes a good debt and is paid, and in the *Gleaner* case (1) as I have said, it was regarded as a consequence of the early part of the decision, that a receipt in a subsequent year of a debt previously treated as bad could not be brought into account in that year, or made a ground for revising or reopening the earlier assessments. In the *Absalom* case (1) that consequence was not referred to, save by Lord Porter who said (2): " Your Lordships' attention, however, has " been drawn to the practice in the past of the Inland Revenue " authorities of making an allowance in respect of losses for bad " or doubtful debts as and when they occur, though the debt " itself was originally treated as being of its face value in a " previous year's accounts. Such a practice necessitates, I " think, the corresponding obligation on the part of the tax- " payer to submit in a later year to an increase in the sum at " which a debt previously treated as bad or doubtful should be " brought into account if, in fact, a payment greater than the " assumed value had been obtained or seems likely to be " obtained, on a later occasion." That appears to mean that, in Lord Porter's view, a subsequent improvement in the debt in a later year could be given effect to, notwithstanding that the debt had not in fact been paid because he uses the phrase " seems likely to be obtained." I am not sure that I would accept that view; but we have not to consider it here because we are now dealing with a case where the debt has in fact been paid. Then he refers to *Anderton & Halstead, Ld.* v. *Birrell* (3), and says: " The decision in that case turned upon a different " point, viz., whether the debt could be treated as having been " mistakenly valued at too low a figure in the years in which the " value had been written down, so that the profits of those " years could be recalculated, the value written up, and the sum " on which tax was payable, increased." That was a demand by the Crown to get what it wanted by a different method, namely, by re-opening the earlier assessment. Lord Porter goes on: " The argument that it could be so treated was held to be " unsound, but nothing was said to throw doubt upon the right " of the subject to have the value of a debt reduced at any time " as and when it was discovered to be bad or doubtful, or of the " Crown to have it increased in some future year if it proved to " be of greater value than had been assumed in an earlier year " when it was brought into account or valued." Lord Porter took the view that, if the debt was paid in the subsequent year in whole or in part, that payment was a matter to be brought

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(1) [1922] 2 A. C. 169.

(2) [1944] A. C. 204.

(1) [1944] A. C. 204.
(2) Ibid. 226.
(3) [1932] 1 K. B. 271.

into account; but he also seems to have taken the rather more extreme view that, even if it were not paid, a mere change of its value would justify giving effect to that change in the account of the year in which it took place. As I have said, I am not prepared without further consideration, to accept that.

When regard is had to the position when the company in the year four received a sum towards paying the debt, the first question that arises is whether as between the Revenue and the taxpayer, the sum so received has been brought into account for tax purposes. Mr. Grant says: "Yes, it has. It was "brought into account in the form of a debt in the year one, "according to the ordinary practice, and, having been brought "into account in the form of a debt in the year one, it is not "possible to strike it with tax in the year four when it is "received." The reason why a receipt is not taxed in the year of receipt, I apprehend, is that it has already been taxed in the form of a debt in the year to which the debt is referable. But, in the present case, it seems to me impossible to disregard what has happened in the years two and three as affecting the position of the taxpayer, on the one hand, and the Crown on the other. It seems to me to be quite impossible to say that this receipt ought to be treated as having been previously brought into account for tax at all. It is perfectly true that it was originally brought into account in its then shape of a debt; but the effect of what happened in years two and three appears to me to have reversed that position altogether. The net result is that, at the end of the year three, it is untrue to say that this particular item has been brought into account for tax purposes. Although it was brought in in calculating the profits in the year one, it was taken out again in calculating the profits of the years two and three. Why should not the receipt in year four be struck with tax when it has not so far been brought into effective computation? It is not like an ordinary trading debt which, when received, will not be taxed a second time. This is a peculiar debt, having regard to its history, of which it is impossible to say that, at the time when it was received, it had been brought into account for tax purposes while it was still only a debt. You cannot put what happened in the year one into a sort of watertight compartment and disregard what happened in the years two and three. In my opinion, you must look to the result of all the transactions and ask yourself in the year four: what is the status of this receipt as between the taxpayer and the Revenue? Is it a receipt which must be excluded from computation on the ground that it has already come in in another form, namely, the form of a debt, or is it to be treated as something which has never been brought into account at all owing to the particular provisions of r. 3 (i.), and to what, in fact, was done under those provisions? In my opinion, the Crown's contention is right in this matter.

Dr. Charlesworth pointed out that the receipt in the year four had its origin, from the commercial point of view, in the coal contract made in the year one. No doubt that is perfectly true, but the question we have to decide is: what is the status of this receipt as between the taxpayer and the Revenue having regard to the events which have happened? Clearly, as Dr. Charlesworth points out, if in year one there had been a debt which, for some reason, had been omitted, and then in year four the amount of that debt was paid, the proper course, according to the ordinary practice, would be not to treat that as a trading receipt of year four, but as a trading receipt of year one, when it ought to have appeared in the accounts in its then form of a debt. That is perfectly true, but the proper remedy in that case is to re-open, by proper procedure, the account of year one. But that is not this case at all. That is a case of mere omission. This is a case where the whole position of the debt has been completely revolutionized by what happened in years two and three. I can see no reason for saying that, as between the taxpayer and the Revenue, this receipt must be attributed to the year one.

In my opinion, the learned judge was perfectly right, and the appeal must be dismissed.

SOMERVELL L.J. I agree.

COHEN L.J. I agree.

Appeal dismissed.

Solicitors: *Hyde, Mahon & Pascall for Wilkinson & Marshall, Newcastle-upon-Tyne; Solicitor of Inland Revenue.*

H. C. G.

1946
Jan. 29, 30;
Feb. 15.

Lord Goddard C.J., Humphreys and Henn Collins JJ.

POWELL *v.* MAY.

Local government—County council—By-law prohibiting betting—Validity —Repugnancy to general law—Street Betting Act, 1906 (6 *Edw.* 7, *c.* 43), *s.* 1, *sub-ss.* 1, 4; *s.* 2—*Betting and Lotteries Act,* 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 2, *sub-s.* 1.

A by-law made by the Glamorgan county council pursuant to the provisions of s. 23 of the Municipal Corporations Act, 1882, provided that " no person shall frequent and use any street or other public " place either on behalf of himself or any other person for the " purpose of book-making or betting or wagering or agreeing to " bet or wager or paying or receiving or settling bets." " Public " place " was defined, as including, " any common, public park, " pleasure ground, roadside waste, foreshore, church yard or " chapel yard, or any open space to which the public have access " for the time being ":—

Held, that the by-law was ultra vires the county council on the ground that it was repugnant to the general law of the land as contained in the Street Betting Act, 1906, s. 1, sub-s. 1 (4.) and the Betting and Lotteries Act, 1934, s. 2, sub-s. 1.

CASE STATED by quarter sessions.

An information was preferred by the respondent, W. C. May, against the appellant, Jack Powell, a bookmaker, before a court of summary jurisdiction sitting at Bridgend in the County of Glamorgan under by-law No. 7 of the Glamorgan County by-laws made pursuant to s. 23 of the Municipal Corporations Act, 1882 (1), for that he on July 22, 1944, in the parish of Laleston in the county of Glamorgan frequented and used a public place, namely part of a field which was an open space to which the public had access for the time being, for the purpose of bookmaking contrary to the said by-law. The court convicted the appellant and imposed a fine of ten shillings. The appellant, appealed to quarter sessions and upon the hearing of the appeal the following material facts were proved or admitted: On July 22, 1944, a race meeting was held in a certain field at Laleston, which was neither an approved racecourse nor a licensed track. Racing was confined to horse-racing. The notice required to be given by s. 2, sub-s. 1 (*b*) (ii.) of the Betting and Lotteries Act, 1934, had been given to the chief constable of the county and bookmaking had been carried on in the field on one day only during the previous twelve months. A number

(1) Repealed by s. 307, sub-s. 1, of the Local Government Act, 1933, but such by-laws are saved by proviso (1.) to that sub-section.

of bookmakers, including the appellant, were present at the meeting and there carried on the business of bookmaking. The field in question, which was part of a farm, was adjacent to the highway and had an area of sixteen acres. It was enclosed on all sides by a hedge, but had one gateway opening on to the highway through which the public obtained access to the field on payment of two shillings and sixpence.

It was contended, inter alia, for the appellant on the appeal that by-law No. 7 was invalid and unenforceable in that it was repugnant to the law of England as contained in the Street Betting Act, 1906, and the Betting and Lotteries Act, 1934 (1).

Quarter sessions found as a fact that the appellant had frequented the field for the purpose of bookmaking and held that the by-law was valid and enforceable. They accordingly dismissed the appeal.

The appellant appealed.

Beyfus K.C. and *Roger Willis* for the appellant. The decision

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(1) The Street Betting Act, 1906, s. 1, sub-s. 1 (4.) : " For the " purpose of this section the word " ' street ' shall include any high- " way and any public bridge, road, " lane, footway, square, court, " alley or passage, whether a " thoroughfare or not ; and the " words 'public place' shall include " any public park, garden or sea- " beach, and any unenclosed " ground to which the public for " the time being have unrestricted " access, and shall also include " every enclosed place (not being a " public park or garden), to which " the public have a restricted right " of access, whether on payment " or otherwise, if at or near every " public entrance there is con- " spicuously exhibited by the " owners or persons having the " control of the place a notice " prohibiting betting therein."

Section 2 : " Nothing contained " in this Act shall apply to any " ground used for the purpose of a " racecourse for racing with horses " or adjacent thereto on the days " on which races take place."

The Betting and Lotteries Act, 1934, s. 2, sub-s. 1 : " Book- " making shall not be carried on on " any track unless the occupier of " the track is the holder of a licence " in force, under this part of the " Act authorizing the provision of " betting facilities on that track :

" Provided that the foregoing " provisions of this sub-section " shall not apply in relation to— " (*a*) anything done on any track " which is an approved horse race- " course on any day on which that " track is used only for the purpose " of horse races ; or (*b*) anything " done on any track on any day if " —(i.) during the year in which " that day falls bookmaking has " not been caried on on that track " on more than seven previous " days ; and (ii.) notice of the " intention to permit bookmaking " on that track on that day has " been given by post not less than " seven clear days beforehand by " the occupier of the track to the " chief officer of police."

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of quarter sessions was wrong. The appellant did not infringe the by-law and in any event if he did, the by-law is invalid as being repugnant to the general law of the land as laid down in the Street Betting Act, 1906, and the Betting and Lotteries Act, 1934. By s. 1, sub-s. 1 (4.) of the Act of 1906, the provisions of the Act do not apply in the case of an enclosed place to which the public have a restricted right of access unless at or near every public entrance there is conspicuously exhibited by the owners or the persons having control of the place a notice prohibiting betting thereon. No such notice was displayed in the present case. Again, by s. 2, nothing contained in the Act is to apply to any ground used for the purpose of a racecourse for racing with horses or adjacent thereto on the days on which races take place. By s. 2, sub-s. 1 of the Act of 1934 bookmaking is not to be carried on on any track unless the occupier is the holder of a licence authorizing the provision of betting facilities on that track, but this provision does not apply in relation to anything done on any track on any day, if during the year in which that day falls bookmaking has not been carried on on that track on more than seven previous days, and notice of the intention to permit bookmaking on the track on that day has been given to the chief officer of police. In the present instance there had only been one previous day's racing, and the prescribed notice had been duly given. The by-law is repugnant to the provisions of both Acts and is therefore invalid. In *White* v. *Morley* (1), Channell J. said that " a by-law must not alter the " general law by making that lawful which the general law " makes unlawful ; or that unlawful which the general law " makes lawful." If there is such a doctrine as that of repugnancy between by-laws and legislation, it is difficult to think of a clearer case than the present where the legislature says in the Betting and Lotteries Act, 1934, that a thing may be done and the by-law says that it may not. In *Strickland* v. *Hayes* (2) Lindley L.J. said " Looking at that section " (s. 23 of the Municipal Corporations Act, 1882), " I cannot find that it was " intended to give power to make by-laws creating any new " criminal offence. Of course, by-laws must do more than " merely reiterate the provisions of Acts of Parliament, " otherwise they would be nugatory ; but it is important to see " that they are strictly within the authority under which they

(1) [1899] 2 Q. B. 34, 39.

(2) [1896] 1 Q. B. 290, 292.

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" were made." In *Thomas* v. *Sutters* (1) Lindley L.J. said that a by-law was bad because it dealt precisely with a matter with which Parliament had already dealt in an Act addressed to the very same thing.

Sutton K.C. and *Carey Evans* for the respondent. The decision of the justices was right. The validity of a by-law in terms practically identical with that under consideration has been upheld over and over again (e.g., see *Thomas* v. *Sutters* (1).)

[LORD GODDARD C.J. That was before the Street Betting Act, 1906, and the question there was whether the by-law was repugnant to the Metropolitan Streets Act, 1867.]

The position in regard to a by-law is this : Parliament may by an Act prohibit certain things, but by so doing it does not declare other things to be lawful. To say that a by-law can only prohibit something which Parliament has already prohibited, is, at the best, to make the by-law mere machinery for enforcing the Act, and at the worst to make the by-law nugatory. There is nothing to prevent a by-law from making somewhat more stringent provisions in regard to a particular matter in a particular locality than Parliament has made them for the country as a whole. The by-law here in question is not dealing with the same matter as the Street Betting Act, 1906. What it was concerned with was the good government of the county, a matter which must be left to those responsible for that government, and it may well be that it is very undesirable that race meetings should not be held in a particular locality. The Street Betting Act, 1906, on the other hand, is dealing with the evil of betting as a whole.

[LORD GODDARD C.J. Betting is not an offence at common law. Parliament has said that betting in the street or in a public place shall be an offence, with certain exceptions. Can a by-law say that it shall be an offence whether the exceptions apply or not ?]

In *White* v. *Morley* (2) it is true that it was said that a by-law may not make unlawful that which the general law makes lawful, but that means something which is expressly made lawful by the general law. Unless it can be said that this by-law is dealing with something which has expressly been made legal by Parliament, it cannot be said to be a bad by-law as being repugnant to the law of the land.

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(1) [1900] 1 Ch. 10.

(2) [1899] 2 Q. B. 34, 39.

In *Thomas* v. *Sutters* (1) Sir Francis Jeune P., said: "An "Act of Parliament speaking for the whole country renders "certain things illegal. It does not at all follow that a by-law "speaking for a particular locality may not make some more "stringent regulations with the same object. That, as it seems "to me is perfectly within the competence of a local authority. "When an Act of Parliament has forbidden certain things to be "done in certain places, it seems to me perfectly consistent "with that that a municipality, with regard to their particular "locality should go somewhat beyond the Act, not contravening its spirit, but carrying it out, and making regulations "somewhat wider than those to be found in the Act." Those words exactly apply in the present instance. In *Burnett* v. *Berry* (2), Lord Russell of Killowen C.J. said "As to the case "of *Strickland* v. *Hayes* (3), I do not think that Lindley L.J. "in the language he is reported to have used, can have meant to "convey that a by-law made under the Municipal Corporations "Act, 1882, can only prohibit an act so far as the doing of that "act is created an offence by the general law; because that "would be to reduce by-laws to mere machinery by which "existing offences could be punished." It is submitted that it can no longer be said that a by-law is bad if it creates a new offence.

Willis replied.

Cur. adv. vult.

Feb. 15. The judgment of the court was read by LORD GODDARD C.J. [After stating the terms of by-law No. 7 and the material facts, the judgment continued:] There is no finding whan the by-law was made, but it was found that it was made under s. 23 of the Municipal Corporations Act, 1882, and the same power of making by-laws as is thereby given to municipal corporations is conferred on county councils by s. 16 of the Local Government Act, 1888, now replaced by s. 232 of the Local Government Act, 1933. The objection taken by the appellant to this by-law is that it is ultra vires the county council because it is repugnant to the general law of the land. By-laws in form indistinguishable from the present have been before the courts on more than one occasion and upheld, but all those cases were before the Street Betting Act, 1906, and therefore also before the Betting and Lotteries Act, 1934, and the question

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(1) [1900] 1 Ch. 10, 16.
(2) [1896] 1 Q. B. 641.
(3) [1896] 1 Q. B. 290.

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that has to be decided in the present case is whether this by-law can be regarded as valid although it goes beyond the provisions of those general Acts and makes something unlawful which is expressly exempted from the provisions of those Acts and which it is accordingly argued is at least inferentially permitted by them. There is no question but that a by-law which is repugnant to the general law is invalid, but it is not so easy to determine what is covered by the word " repugnant," and under what circumstances a by-law is to be held invalid on that ground. Obviously, it cannot permit that which a statute expressly forbids nor forbid that which a statute expressly permits, though it can, of course, forbid that which otherwise would be lawful at common law, otherwise no prohibitory by-law could be valid. It is but seldom that a statute expressly enacts that something shall be lawful, unless indeed it is dealing with the conferment of powers upon some body or person, but it is by no means unusual to find a statute which, while making some particular thing unlawful, goes on to provide that the thing prohibited may be done or at least not be prohibited if certain conditions are observed. If Parliament prohibits a certain thing from being done and imposes a penalty for doing it and in the same Act says the prohibition is not to apply, or that no penalty is to be incurred, if the very same thing is done in a certain way or under certain conditions, it seems almost pedantic to say that Parliament has not at least impliedly authorized the doing of that thing subject to the conditions laid down.

Turning to authority, in *Thomas* v. *Sutters* (1), Lord Lindley gave what seems to be a most useful and helpful test for deciding whether a by-law is invalid on the ground of repugnancy. Explaining his earlier decision in *Strickland* v. *Hayes* (2), he said that the by-law in the earlier case was hopelessly bad because it dealt precisely with a matter with which Parliament had already dealt in an Act addressed to the very same thing. Before we consider the by-law in relation to the two statutes we have already mentioned, we will refer to two judgments of Channell J. whose opinions are always treated with the utmost respect in matters relating to local government. In *White* v. *Morley* (3), the learned judge said " A by-law is not bad because " it deals with something that is not dealt with by the general " law. But it must not alter the general law by making that

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(1) [1900] 1 Ch. 10.
(2) [1896] 1 Q. B. 290.
(3) [1899] 2 Q. B. 34, 39.

" lawful which the general law makes unlawful ; or that unlawful which the general law makes lawful." In that case a by-law in the same terms as the present was in question in days before the Street Betting Act was passed. It was argued that the subject-matter had already been dealt with by s. 23 of the Metropolitan Streets Act, 1867, which made it an offence to obstruct a street by three or more persons assembling for the purpose of betting, but the court held that the section was a provision relating to traffic in streets and dealing with obstruction, while the by-law aimed at frequenting a street for the purpose of betting, which was a different thing and a different mischief. Then in *Gentel* v. *Rapps* (1), the same learned judge said " A by-law is not repugnant to the general law merely " because it creates a new offence, and says that something shall " be unlawful which the law does not say is unlawful. It is " repugnant if it makes unlawful that which the general law " says is lawful. It is repugnant if it expressly or by necessary " implication " (we emphasize those words) " professes to alter " the general law of the land . . . . Again, a by-law is " repugnant if it adds something inconsistent with the provisions " of a statute creating the same offence; but if it adds something " not inconsistent, that is not sufficient to make the by-law " bad as repugnant." The by-law in that case was made under the Tramways Act, 1870, which enabled the promoters of a tramway to make by-laws preventing nuisances in any carriage belonging to them. The by-law provided that " No person shall " swear or use offensive or obscene language whilst in or upon " any carriage." It did not contain any such words as " so as " to be a nuisance or annoyance to others," although the Towns Police Clauses Act, 1847, which was in force in the district and a local Act both prohibited the use of obscene language " so as to be a nuisance or annoyance to others." So there one had the case of a general prohibition in the Town Police Clauses Act and also in a local Act in force in the district and a by-law applicable to a limited class of case, namely, swearing in tramcars. There is nothing in the general Act saying that persons may swear anywhere but in the public street, so a by-law dealing with swearing in a particular place, though in one sense an extension of the statutory prohibition, is in no way in conflict with it. That is just the sort of case with which we think Sir Francis Jeune P., was dealing in that passage in his judgment in *Thomas* v. *Sutters* (2) on which Mr. Sutton so

(1) [1902] 1 K.B. 160, 166. (2) [1900] 1 Ch. 10.

strongly relied, where he said " When an Act of Parliament " has forbidden certain things to be done in certain places, " it seems to me perfectly consistent with that that a municipality, with regard to their particular locality, should go " somewhat beyond the Act, not contravening its spirit, but " carrying it out, and making regulations somewhat wider than " those to be found in the Act." The spirit of the Act was in no way contravened by the by-law in question. The Act forbids swearing or obscene language in public so as to be a nuisance or annoyance to others, and a by-law forbidding altogether swearing in tramcars, where it must of necessity be a nuisance, is not inconsistent with the general provisions of the Act.

We turn now to the Street Betting Act, 1906, and the Betting and Lotteries Act, 1934. Section 1, sub-s. 1, of the former Act makes it an offence for any person to frequent or loiter in streets or public places for the purpose of bookmaking or betting or wagering or agreeing to bet or wager or paying or receiving or settling bets and the words are for all essential purposes the same as those contained in the by-law. Sub-section 4, after providing what shall be included in the word "street," provides that " the words ' public place ' shall include any public park, " garden, or sea beach, and any unenclosed ground to which the " public for the time being have unrestricted access, and shall " also include every enclosed place (not being a public park or " garden) to which the public have a restricted right of access." Pausing there for a moment, it seems to deal with exactly the same places as does the by-law. The only distinction is that the Act distinguishes between enclosed and unenclosed places, while the by-law deals with any open space to which the public have access for the time being and therefore includes both unenclosed and enclosed spaces. The Act, however, provides that for the purpose of the section, in the case of an enclosed space betting is only unlawful " if at or near every public entrance there is " conspicuously exhibited by the owners or persons having the " control of the place a notice prohibiting betting therein." If, therefore, under that Act a person were summoned it would be a good defence to show that the place where he was betting was an enclosed place to which the public had a restricted right of access and that there was no notice exhibited prohibiting betting. Section 2 of this Act provides that " nothing contained in this Act shall apply to any ground used for the " purpose of a racecourse for racing with horses or adjacent "thereto on the days on which races take place." There is no finding in the case that this field was a racecourse, but it was undoubtedly a track as defined by s. 20 of the Act of 1934, and so was within cl. (*b*) of the proviso to s. 2 of that Act. Section 2 provides that "bookmaking shall not be "carried on on any track unless the occupier of the track "is the holder of a licence in force under this Part of this Act "authorizing the provision of betting facilities on that track." But then it goes on to provide that the foregoing provisions of the sub-section shall not apply in relation to "anything "done on any track on . . . . any day if (i.) during the "year in which that day falls bookmaking has not been carried "on on that track on more than seven previous days; and "(ii.) notice of the intention to permit bookmaking on that "track on that day has been given . . . . beforehand . . . . to "the chief officer of police." Both these provisions were satisfied in this case. Now, it seems to us that if these statutes had provided in terms that it should be a good defence to a prosecution to prove those matters to which we have referred, a by-law which says that those facts should provide no defence would be repugnant to the general law, and this is precisely what this by-law effects. It deprives a bookmaker of the defence which he would have had under s. 1, sub-s. 4 of the Street Betting Act that there was no notice prohibiting betting exhibited; it would deprive him of showing that the ground on which he was betting was a racecourse and that racing was taking place on the day on which he was betting and it would also deprive him of relying upon the provisions of s. 2, sub-s. 1, of the Act of 1934. That is the effect of the by-law and it is by its effect and not its mere form that it must be judged.

In our opinion this by-law is repugnant to both these Acts. In effect those Acts do permit bookmakers to bet at race meetings provided they observe certain conditions. In our opinion it is beyond the powers of a county council to enact a by-law which prohibits them from doing that which the general statutes enable them to do. We think, therefore, that the appeal should be allowed and the decision of the quarter sessions reversed and the conviction before the magistrates quashed.

Appeal allowed.

Solicitors for appellant: *Field Roscoe & Co., for Frank Hill & Co., Cardiff.*

Solicitors for respondent: *Torr & Co., for Richard John, Cardiff.*

P. B. D.

SHEEHAN *v.* CUTLER. ([1946] K.B. 339; 174 L.T. 411).
Applied. SELWYN *v.* HAMILL .. .. .. [1948] 1 All E.R. 70

Considered. LANGFORD PROPERTY CO., LTD. *v.* GOLDRICH. [1948] 2 All E.R. 439.

Distinguished. LANGFORD PROPERTY CO., LTD. *v.* GOLDRICH. [1949] 1 All E.R. 402.

Considered. STANDINGFORD *v.* PROBERT
[1950] 1 K. B. 877

Followed. LANGFORD PROP. CO. *v.* GOLDRICH.
[1948] 2 K. B. 423

SHEEHAN *v.* CUTLER.

C. A.

1946
Feb. 27.

Scott and Morton L.JJ. and Wynn-Parry J.

Landlord and tenant—Rent restriction—Claim for possession—" Suitable " alternative accommodation "—Single dwelling-house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32), s. 3, sub-s. 3.

" Suitable alternative accommodation available for the tenant " within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sub-s. 3, contemplates accommodation in a single dwelling-house and is not satisfied by the offer of a house with the additional accommodation of one room in a separate house.

APPEAL from Bromley county court.

The plaintiff, S. H. Sheehan claimed from the defendant, F. J. Cutler, the possession of a house No. 315 Main Road, Sidcup, Kent, of which the defendant was the tenant. The house in question had been let to him in 1940 on a monthly tenancy and was bought by the plaintiff in 1944 during the currency of the defendant's tenancy. The plaintiff gave the defendant a notice to quit expiring on September 1, 1945, and on his declining to leave, took proceedings under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1)

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1: " No order " . . . . for the recovery of " possession of any dwelling-house " to which the principal Acts " apply . . . . shall be made or " given unless the court considers " it reasonable to make such an " order . . . . and either—

" (*a*) the court has power so " to do under the provisions set " out in the First Schedule to " this Act; or

" (*b*) the court is satisfied that " suitable accommodation is " available for the tenant or will " be available for him when the " order . . . . takes effect.

Sub-section 2: " A certificate " of the housing authority for the " area in which the said dwelling-" house is situated, certifying that " the authority will provide suit-" able alternative accommodation " for the tenant by a date specified " in the certificate, shall be con-" clusive evidence that suitable " alternative accommodation will " be available for him by that " date."

Sub-section 3: " Where no such " certificate as aforesaid is pro-" duced to the court, accommoda-" tion shall be deemed to be suit-" able if it consists either—

" (*a*) of a dwelling-house to " which the principal Acts " apply; or

" (*b*) of premises to be let as a " separate dwelling-house on " terms which will, in the " opinion of the court, afford to " the tenant security of tenure " reasonably equivalent to the " security afforded by the princi-" pal Acts in the case of a " dwelling-house to which those " Acts apply,

" and is in the opinion of the court,

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to recover possession. As the "suitable alternative accommodation" required by the section to be available for the tenant, the plaintiff offered a tenancy of No. 319 Main Road, Sidcup, where he was himself living with his family, which was refused by the defendant on the ground that the accommodation was inadequate. At the hearing in the county court the judge suggested that the plaintiff should offer to the defendant a tenancy of No. 319 and, in addition, a tenancy of one room in No. 315 which room was then in the occupation of the defendant's brother who formed a member of his household. On the plaintiff giving an undertaking that he would grant the defendant a protected tenancy of No. 319 at a rental of 1*l.* a week and a tenancy of the room at No. 315 at a rent to be agreed or fixed by the registrar, the judge made an order for possession in favour of the plaintiff. The defendant appealed.

Hillard for the defendant. The county court judge misdirected himself in law in holding that a tenancy of a separate dwelling-house and of one room in another house constituted suitable alternative accommodation within the meaning of s. 3 of the Act of 1933. It is quite clear that suitable accommodation as defined in sub-s. 3 of s. 3 means accommodation in one house and not two. So far as (*a*) in the subsection is concerned, the language admits of no doubt since it is provided that accommodation shall be deemed to be suitable if it consists of "a dwelling-house to which the principal Acts apply." It is submitted that the words of (*b*) "premises to be let as a separate dwelling," must equally relate to a separate dwelling-house and not to a conglomeration of accommodation in several houses. The remaining conditions in sub-s. 3 in relation to proximity to the tenant's place of work, similarity of rental and the needs of the tenant and his family are only consistent with one dwelling-house being the measure of suitable accommodation. When, as in sub-s. 3 the words "shall be deemed" are followed by an exhaustive analysis of

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"reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—

"(i.) similar as regards rental and extent to the accommodation offered by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family; or

"(ii.) otherwise reasonably suitable to the means of the tenant and his family as regards extent and character."

the possibilities, it means that only those possibilities are to be considered in deciding the question under discussion. For the meaning of the words "deemed to be" see *Reg*. v. *County Council of Norfolk* (1). The view that the necessary suitable accommodation is to be found in one dwelling-house is supported by the definition of dwelling-house in s. 16 of the Act of 1933, and also by the language of s. 7, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938.

Wynn Werninck for the plaintiff. The county court judge had jurisdiction to make the order for possession under s. 3, sub-s. 3, of the Act. In interpreting and applying the words of s. 3 a broad view must be taken, bearing in mind the existing difficulties of housing accommodation, which were well within the knowledge of the judge. By s. 3, sub-s. 1, the test is whether it is reasonable to make the order and here the judge was of opinion that it was. The words "deemed to be suitable" do not exclude the possibility that other accommodation, beyond that specifically referred to in sub-s. 3, might be held to be suitable. Further, the premises let in this case were "premises let as a separate dwelling" within the meaning of (*b*) of sub-s. 3.

SCOTT L.J. The question raised by the appeal is whether sub-s. 3 of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 entitled the judge, in estimating what would constitute "suitable alternative accommodation" to take into account, as part of such accommodation, a single room outside the dwelling-house, 319 Main Street, which constituted the main part of the alternative accommodation the plaintiff was offering.

It was contended by Mr. Hillard for the tenant that the language of sub-s. 3 is quite plain; that by "a dwelling-"house" a single house is meant; and that as that was obvious under (*a*) so it followed that "premises to be let as a "separate dwelling" under (*b*) ought, in the same way, to be construed as referring to a separate dwelling. I agree that (*b*) equally with (*a*) does contemplate a separate dwelling, and requires it either to have the same rights as a rent-restricted house, or to enjoy a security of tenure reasonably equivalent to the security of tenure afforded by the Rent Restriction Acts. The house must also comply with the other provisions of the sub-section in respect of the needs of the tenant and his family as regards proximity to the tenant's work, rental and extent

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and character. These additional considerations, however, do not affect the question on which this appeal depends, which is simply whether the judge was entitled to treat a single room in No. 315 Main Street, which was to be occupied by the tenant's brother, as if it were a part of No. 319. In my view the learned judge had no jurisdiction to do so.

I agree with what Morton L.J., said in the course of the argument that having regard to the existing difficulties of providing housing accommodation for people in this country, what the judge proposed to do was very possibly an admirable and reasonable course to adopt. Unfortunately it was not a course which was legally open to him. Under the Act it is quite clear that it is the separate dwelling which acquires the status of a controlled dwelling-house. To attempt to treat a single outside room as part of what is to constitute " a separate " dwelling-house " is to go as much outside the Act as it would be to try and make up a house out of several single rooms in different houses, all to be used for the domestic purposes of the one family, as if they were all in a single house. It is only a question of degree. The Act requires the suitable alternative accommodation to be found in a single separate dwelling-house capable of satisfying the various requirements of sub-s. 3 of s. 3. In my opinion the decision of the judge was wrong and the appeal must be allowed.

MORTON L.J. What this court has to determine is whether accommodation in two separate houses, for which provision is made in the judge's order, is "suitable alternative accom-" modation " within the meaning of s. 3, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and that, in turn, depends on whether the proposed accommodation falls within the terms of sub-s. 3 of s. 3. That sub-section applies to the present case, and provides, by sub-cl. (*a*), that " accommodation shall be deemed to be suitable " if it consists of " a dwelling-house to which the principal Acts " apply." It may be pointed out that under the Interpretation Act, 1889, the words " a dwelling-house " would include the plural unless a contrary intention appears. In my opinion, for reasons which I shall mention later, a contrary intention does appear in the present instance. The sub-section goes on to provide by sub-cl. (*b*) as an alternative, that accommodation shall also be deemed to be suitable if it consists of " premises " to be let as a separate dwelling " on terms which will afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of " a dwelling " house to which these Acts apply." The repeated use of the singular is to be noted. So far, two alternatives have been stated, but there follows a further qualification which the accommodation offered must possess if it is to be deemed to be suitable. It must be " reasonably suitable to the needs of the " tenant and his family as regards proximity to place of work." It seems to me that in this sub-section the legislature is regarding the tenant and his family as one unit and is providing that that unit is to be accommodated in one dwelling-house under sub-cl. (*a*) or in premises to be let as one separate dwelling on terms which answer the description given in sub-cl. (*b*). The provisions which follow, and in particular the provisions of sub-cl. (ii.) in reference to " the needs of the tenant and his " family " in regard to the extent and character of the accommodation, point in the same direction. We were referred to the definition of " dwelling-house " in s. 16 of the Act where it is said that " dwelling-house has the same meaning as in the principal " Acts, that is to say, a house let as a separate dwelling or a part " of a house being a part so let." That perhaps, does not carry the matter much further.

I think, however, that it is helpful to refer to s. 7, sub-s. 3 of the Act of 1938, which provides that " accommodation shall " not be deemed for the purposes of s. 3 of the Act of 1933 " . . . . . to be suitable to the needs of a tenant and his family " if the result of their occupation thereof would be that it " would be an overcrowded dwelling-house for the purposes " of the Housing Act, 1936." That sub-section again, is dealing with what is to be deemed suitable to the needs of a tenant and his family, and I think it contemplates, and contemplates only, the event of one dwelling-house being offered as alternative accommodation. It was suggested by Mr. Wynn Werninck that the words " deemed to be suitable " would not exclude other possible forms of accommodation beyond those suggested in sub-s. 3, if the judge were satisfied that the accommodation was in fact suitable. I do not doubt that in certain contexts the words " shall be deemed to be suitable " would not exclude the possibility that other accommodation, outside that specified, might be held to be suitable, but in my opinion sub-s. 3 is intended to give a comprehensive definition of suitable alternative accommodation in cases to which sub-s. 2 does not apply, and nothing which falls outside sub-ss. 2 and 3 can be regarded as suitable accommodation.

With reference to the meaning of the phrase " deemed to be " we were referred to a passage in the judgment in *Reg.* v. *County Council of Norfolk* (1). The court there was considering the meaning of s. 14 of the Highways and Locomotives Amendment Act, 1878 which provides that "the following areas "shall be deemed to be highway areas for the purposes of this "Act; (that is to say) (1.) Urban Sanitary Districts; "(2.) Highway Districts; (3.) Highway parishes not included "within any highway district or any Urban Sanitary District." Obviously the subject-matter of that section is widely different from that with which we are concerned, but in the course of his judgment Cave J., said "I think it is impossible to read ss. 13 "and 14 without seeing that they are intended to and do limit "the meaning of the words 'highway authority' and the "words 'highway area,' and that, reading the whole of these "sections together, these commissioners are not within the "contemplation of the legislature as being a highway authority, "or their district as being a highway area." Cave J. read s. 14 and continued: "Now, that language is, generally speaking, "loose, because, when it is said that a thing is deemed to be "something, it is not meant to say that it is that which it is to "be deemed to be. It is rather an admission that it is not that "which it is deemed to be, and that notwithstanding it is not "that particular thing, nevertheless for the purposes of the "Act it is to be deemed to be that thing. I think one can "hardly apply that to s. 14, and that when it says 'the follow-"'ing shall be deemed to be highway areas for the purposes of "'this Act' and then goes on to specify all the areas with "which one is likely to meet, it must be taken that for the "purposes of s. 13 there are enumerated all the areas to which "that section is to apply."

It seems to me, that, similarly, sub-s. 3 of s. 3 of the Act of 1933 has enumerated and described all the forms of accommodation which can be regarded as suitable, in cases which are outside sub-s. 2. It follows that the learned county court judge was not entitled to treat accommodation in two separate houses as being suitable. The appeal must, therefore, be allowed.

WYNN-PARRY J. I agree and do not desire to add anything.

Appeal allowed.

Solicitor for the defendant: *Lucien A. Isaacs.*
Solicitors for the plaintiff: *F. Duke & Sons.*

P. B. D.

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(1) 65 L. T. 222.

STARR *v.* THE MINISTER OF PENSIONS.

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BOURNE *v.* THE SAME.

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Jan. 11, 28;
Feb. 26.

Denning J.

Pension—Member of military forces—Attributability of injury or disease to war service—Evidence—Principles applicable—Royal Warrant, December, 1943 (*Cmd.* 6489), *art* 4 (2.) (3.).

In administering the provisions of art. 4 of the Royal Warrant of December, 1943 (1), the following principles apply :—

(1.) As it is provided by art. 4 (2) that in no case shall there be an onus on any claimant to prove the fulfilment of the conditions entitling him to a pension and that he is to be given the benefit of any reasonable doubt, no burden now rests on a claimant to adduce evidence, though he may do so if he wishes.

(2.) It is the duty of the appropriate service department to submit to the Minister all the evidence for or against the claim, including the claimant's medical history. Any medical question may be submitted to a medical officer.

(3.) The Minister has then the quasi-judicial duty of deciding, on all the evidence, whether or not the injury or disease is attributable to war service and whether the other relevant conditions have been fulfilled. He must not decide against the claimant on a mere balance of probabilities, and if the evidence leaves him in reasonable doubt, the claimant must be given the benefit of it.

(4.) The above principles apply in all cases, but under art. 4 (3.), where the injury or disease leading to discharge or death is not noted in a medical report made at the commencement of the claimant's war service, there is a compelling presumption in favour of the claimant which takes the place of evidence and he is entitled to succeed unless each one of the prescribed conditions is negatived by evidence which establishes by a real preponderance of probability that the disease was not attributable to, or aggravated by, war service.

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(1) The Royal Warrant, December, 1943. Article 4 (1.) : "The "disablement or death of a member of the military forces shall "be accepted as due to war service "provided it is certified that—

"(*a*) disablement is due to a "wound injury or disease which—

"(i.) is attributable to war "service ; or

"(ii.) existed before or arose "during war service and has "been and remains aggravated "thereby ; or

"(*b*) the death was due to or "hastened by—

"(i.) a wound injury or "disease which was attributable "to war service ; or

"(ii.) the aggravation by war "service of a wound injury or "disease which existed before or "arose during war service."

(2.) "In no case shall there be an "onus on any claimant under "this Our Warrant to prove the "fulfilment of the conditions set "out in para. 1 of this article "and the benefit of any reasonable "doubt shall be given to the "claimant."

(3.) "Where the injury or "disease which has led to a "member's discharge or death "during war service was not noted "in a medical report made on "that member on the commencement of his war service, the certificate under para. (1.) of this "article shall be given unless the "evidence shows that the conditions set out in that paragraph "are not fulfilled."

(5.) The distinction between cases falling under art. 4 (2.) and those under art. 4 (3.) is that in the former, in order to defeat a claimant, the evidence against him must overthrow any evidence in his favour, while in the latter it must also overthrow the presumption in his favour.

(6.) The Minister is now the certifying authority in place of a medical officer or board and must decide questions of fact or legal questions. When medical questions are involved, they must be referred to a medical officer or board and the Minister's decision must be in accord with their certificate, the claimant being given the benefit of the doubt if the answer to the medical question is open to reasonable doubt.

(7.) The hearing of an appeal by the appeal tribunal is a judicial inquiry in the nature of a fresh hearing. The Minister is the respondent to the appeal but he must impartially put before the tribunal all the relevant facts, including the case for the appellant. In the case of a medical question, the Minister must submit the certificate of the medical authority on which the claim was rejected, but the tribunal are entitled to disregard the certificate in the light of other medical evidence. Evidence may be given in documents or orally, but every document must be available to both sides and each side may put questions to witnesses called on the other side.

(8.) "Evidence" in art. 4 (3.) means evidence which is logically probative. Opinions on a medical question are of no value unless they are those of medical experts and, in order to have probative force, they should be authenticated by a medical man. Unless the views expressed in the Minister's decision have been so authenticated, they cannot properly be described as evidence, but if they are expressly or impliedly admitted by the claimant to be correct, the admission will constitute evidence.

(9.) The expression of the private opinion of the medical member of the tribunal to his colleagues in support of the Minister's decision is not evidence. His function is judicial and he is not to supply, but to adjudicate upon evidence, but in doing so he is entitled to assist the other members of the tribunal to understand the medical evidence and assess its value.

Moxon v. *The Minister of Pensions* [1945] K. B. 490 followed.

Appeals from Pensions appeals tribunals.

Jan. 11. STARR *v.* THE MINISTER OF PENSIONS.

The applicant, a naval officer, rejoined the navy in October, 1940, being then nearly sixty-six years of age. In October,

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1943, he was found permanently unfit for all naval service and discharged, his disability being recorded as glaucoma of the right and left eyes, which disease was not noted in any medical report made on him at the beginning of his war service. He claimed a pension on account of aggravation of glaucoma by war service and also on account of aggravation of high blood pressure (hyperpiesia). In regard to glaucoma the facts were that in May, 1943, the applicant went into the Royal Naval Hospital where it was reported that his eyes were in such a condition that invaliding was strongly recommended. It was further stated that the condition had been aggravated by return to naval service and the carrying out of duties entailing worry and strain in an old man. The report added that the applicant had no definite signs or symptoms of glaucoma before his recall to service. On October 13, 1943, on his discharge, the applicant was seen by a surgeon commander ophthalmic specialist, who reported that the applicant's last post entailed a considerable amount of worry to him, and as worry was a well known contributory factor in glaucoma, and as his eyes had not troubled him before rejoining, the condition was held to have been aggravated by naval service. The Minister rejected the applicant's claim and gave as his reason: "Captain Starr's "invaliding disability is one of primary glaucoma, a pre-"service condition of a slowly progressive type. No acute "attack occurred in service, and for these reasons the Minister "is of the opinion that the condition is unconnected with "service. The effect of worry, a point which has been raised, "might be to produce an attack of acute symptoms, but "no such attack occurred." The applicant appealed and at the hearing of the appeal he challenged the statement of the Minister that no acute attack of glaucoma occurred in the service, alleging that such an attack occurred between December, 1942 and April, 1943. He also produced a report from his own doctor, who had examined his eyes in 1943, 1944 and 1945 and who said "Although it cannot be said that his "glaucoma was due to naval service, I have no doubt that his "vision deteriorated partly as the result of the strenuous "service in the navy."

With regard to blood pressure, Captain Starr was suffering from hyperpiesia on May 28, 1942. Shortly after his discharge in October, 1943, he became seriously incapacitated by it. The Minister rejected his claim and gave as his reason: "This "is a progressive condition secondary to arterial degeneration

" and associated with advancing years. There was no cardiovascular catastrophe on service, nor any acute onset of " symptoms, and, in the Minister's view, therefore, this disability is unrelated to service." On appeal the claimant submitted a report from his own doctor in the following terms: " I consider that the most serious alteration in his condition as " the result of naval service during this war has not been the " change in his eye condition but in his blood pressure and its " results. There have been serious cerebral effects."

The tribunal disallowed the appeal in regard to the claims made in respect of both disabilities, expressing their opinion as follows: " We have very carefully considered this but are " afraid we cannot find any set medical grounds supporting the " contention that either of these complaints have been affected " by service. We have assumed throughout that he did " strenuous service for his age. The ground for objection is a " medical one—strain does not worsen the condition, it either " produces a catastrophe or it does not, and the appeal must be " disallowed."

The tribunal granted leave to appeal.

Melford Stevenson K.C. and *T. J. Kelly* for the appellant.

Sir Donald Somervell K.C. and *H. L. Parker* for the respondent.

Cur. adv. vult.

Jan. 28. NUTTALL *v.* THE MINISTER OF PENSIONS.

The claimant was in the territorial army before the war and was called up for military service on August 24, 1939. On October, 15, 1941, he was discharged from the army, the disability leading to his discharge being recorded as disseminated sclerosis, no record of which was noted in any medical report made on him on the commencement of his war service. During his service, the claimant had been subjected to extraordinary physical and mental strain and loss of sleep and he claimed that the disease from which he suffered was attributable to his war service. The Minister admitted that the disease had been aggravated by war service but said that it was not attributable thereto. He stated as his reason for so holding that " the " clinical findings in the appellant's case, the course of his " disability and the known pathology of the condition afford no " indication that any specific factor in service is responsible,

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" and for these reasons the Minister considers that the disability " is not attributable to service." The claimant appealed and the tribunal found that the cause of disseminated sclerosis was unknown, but that the view generally accepted by the medical profession was that it was due to an infection of the nervous system by some agent, the nature of which was unknown. They also found that fatigue, overwork and intercurrent illnesses was known to influence the condition unfavourably. They said that they were greatly influenced by the fact that the disease was no more common in the army than in civil life and were of opinion that from a medical point of view there was no evidence to support a claim of attributability.

The claimant appealed by leave of the tribunal.

Gorman K.C. and *Blackledge* for the appellant.

H. L. Parker for the respondent.

Cur. adv. vult.

Jan. 28. BOURNE *v.* THE MINISTER OF PENSIONS.

The claimant's husband, Captain Bourne, served from December, 1940, until his death on September 7, 1944, from cancer, a disease which was not noted on any medical report made on him on the commencement of his service. The Minister, who was adverse to the claimant's claim prepared the reason for his decision in the following terms : " Carcinoma at " this site arises in all walks of life and is in no way peculiar to " service in the forces. Although in this case the disease " became manifest in service, in the Ministry's view, in the " light of modern medical knowledge, there were no factors in " the deceased's service in the present war which could have " played a part in the onset or inevitable progression of the fatal " disease." This view was submitted by the awards division to the medical services division, with a request that they would say whether they agreed in the terms of the final decision in the case. The medical service department reported back, " Medically agreed," signed by Dr. Sims. The Minister rejected the claimant's claim. On appeal, the claimant did not adduce any evidence against the view taken by the Minister, but argued that as the cause of cancer is unknown, it was impossible for anyone to say with any reasonable degree of certainty that no factor or incident in the diseased's service had operated to cause or hasten the progress of the disease. The tribunal, on the advice of their medical adviser, rejected the argument. They pointed out that while the precise cause of cancer might remain obscure, there might be adequate material of a scientific or statistical nature, as known to the medical profession, to enable doctors to exclude external factors as having any influence on the disease in a case of that nature. They were satisfied that the opinion of Dr. Sims was in accordance with probability and represented good medicine in the sense that the great majority of modern doctors with any specialized knowledge of the disease would agree with it. They accordingly dismissed the appeal.

The claimant appealed.

Melford Stevenson K.C. and *McQuorn* for the appellant.
H. L. Parker for the respondent.

Cur. adv. vult.

Feb. 26. Denning J. read the following judgment: These three cases bring into prominence the great changes brought about in the latter half of 1943 in regard to war pensions. Previously a claimant was not entitled to a pension unless there was " good and sufficient evidence that his " disability was in fact attributable to war service " (see art. 5 (2.) of the Royal Warrant of January, 1943) ; but, at the end of 1943, the position was radically changed. By art. 4 (2.) of the Royal Warrant of December, 1943, it was expressly stated that " in no case shall there be an onus on any claimant to " prove the fulfilment" of the prescribed conditions " and the " benefit of any reasonable doubt shall be given to the " claimant." There is therefore now no burden on any claimant to adduce evidence. He must, of course, make his claim, but it is the duty of the appropriate service department to submit to the Minister of Pensions all the evidence available, whether for or against the claim, including the claimant's medical history. The claimant may adduce any evidence he wishes, and the Minister may submit any medical question to a medical officer. Then, upon all the evidence, the Minister has to decide whether or not the disease is attributable to war service or the other relevant conditions are fulfilled. His function in this respect is quasi-judicial. He may be able to come to a determinate conclusion without reasonable doubt, but, if the evidence leaves him in reasonable doubt, then the claimant must be given the benefit of the doubt. This means that he must not decide against the claimant on a mere balance of probabilities. There must be a real preponderance of probability against him such as to exclude reasonable doubt. That is a rule as to the weight of evidence which applies in all cases: but, in one special category the warrant introduces an additional element in favour of the claimant.

By art. 4 (3.) of the Warrant of December, 1943, "where an "injury or disease which has led to a member's discharge or "death during war service was not noted in a medical report "made on that member on the commencement of his war "service" he is entitled to a pension "unless the evidence "shows" that the prescribed conditions are not fulfilled. In cases falling in that category, therefore, there is a compelling presumption in favour of the claimant to which effect must be given unless the contrary is shown. That presumption takes the place of evidence. The effect of it is that the claimant succeeds unless each one of the prescribed conditions is negatived by evidence. The amount of evidence required is, again, a real preponderance of probability such as to exclude all reasonable doubt. The evidence must show, by a real preponderance of probability, that the disease was not attributable to war service or aggravated by it, as the case may be. The distinction between art. 4 (2.) and art. 4 (3.) is that, in order to defeat a claimant, in cases under art. 4 (2.) the evidence against him must overthrow any evidence in his favour, whereas, in cases under art. 4 (3.), it must also overthrow the presumption in his favour.

Another matter on which the Warrant of December, 1943, makes a change is the certifying authority. Previously the decision was entrusted to a medical officer or board of medical officers appointed or recognized by the Minister. If they "certified" that the disability was attributable to military service, the claimant was entitled to a pension, but, if they did not certify, he had no remedy. (See art. 2 (3.), and arts 4 and 5 of the Warrant of January, 1943.) But at the end of 1943 the position was changed. The decision is now entrusted to the Minister. If he certifies that the disablement is attributable to war service, the claimant is entitled to a pension. If he rejects the claim on the ground that it is not attributable to war service the claimant has a right of appeal to a pensions appeal tribunal. Many of the claims involve both questions of fact and also medical questions, to say nothing of legal questions

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on the interpretation of the warrant. In so far as they involve questions of fact or legal questions, the Minister must now decide these himself; but, in so far as they involve medical questions, he must submit those questions to a medical officer or board of medical officers, and his ultimate determination must be in accord with their certificate. (See art. 2 (2.) (*b*) and art. 4 of the Warrant of December, 1943.) For instance, if the certificate of the medical officer shows that the answer to the medical question was open to reasonable doubt, the Minister must give the claimant the benefit of that doubt. The substantial change is that the certificate of the medical officers is now confined to medical questions and does not extend to entitlement. That is the province of the Minister or some person acting under his directions. (See art. 69 of the Warrant of December, 1943.)

If the Minister should reject the claim and the claimant appeals to the pensions appeal tribunal, the issue before the tribunal is whether the claim was rightly rejected. (See s. 1 of the Pensions Appeal Tribunals Act, 1943.) The hearing of the appeal is a judicial inquiry. The chairman is a lawyer, and with him sit a medical man and a service man. The appeal is a fresh hearing. The tribunal have to see for themselves whether the prescribed conditions are fulfilled, and in so doing they must give to the claimant the benefits of art. 4 (2.) and (3.) of the warrant. The Minister is the respondent to the appeal, but it is his duty to act impartially. He must put before the tribunal all the relevant facts relating to the appellant's case. When a medical question is involved, therefore, it is his duty to submit to the tribunal the certificate of his medical officers on which he rejected the claim. Although he was bound to determine the matter in accordance with their certificate, the tribunal are not so bound. They can disregard it in the light of other medical evidence. The evidence in the case may be given in documents or orally, but every document must be made available to both sides and each side may put questions to any witness called by the other side. (See Pensions Appeal Tribunal (England and Wales) Rules, 1943, rr. 12 (6.), 13 and 14.)

If the tribunal allow the appeal, the Minister must give a certificate of entitlement in accordance with the decision of the tribunal on the matter. (See art. 2 (2.) (*a*) of the Warrant of December, 1943.)

The cases before me show that the procedure I have outlined has not been followed in regard to matters which involve a medical question. Although the Minister may have submitted the medical question to his medical officers and obtained their views, he has not submitted their certificate on it to the tribunal. He has apparently adopted their views as his own and embodied them as his own views among the reasons for his own decision. By so doing he has made much trouble for himself, because their views as such do not appear, and his own views on a medical question cannot be said to be evidence.

However wide a meaning is given to the word " evidence " in art. 4 (3.), it is plain that only that is evidence which is logically probative. Speaking generally, opinions on a medical question are of no value unless they are the opinions of medical experts, and, in order to have probative force, they should be authenticated by a medical man. Unless the views expressed in the reasons for the Minister's decision have been so authenticated, they cannot properly be described as " evidence " in any sense of the word; but, of course, if the appellant expressly or impliedly admits that the opinions are correct, the admission itself is evidence. On rejecting the Minister's " reasons " as evidence, the tribunals have on occasion found themselves without any evidence in support of the decision of the Minister, and the medical member, in that situation, has sometimes expressed an opinion on the medical question in favour of the Minister's decision; but that, again, is not evidence. The function of the medical member, like that of the other members, is judicial. It is not to supply evidence but to adjudicate on the evidence. In so doing he will, of course, help the other members of the tribunal to understand the medical evidence and assess its value, which is a very important function. It is impossible, however, to treat any independent opinion of his own, expressed privately to his colleagues, as evidence. That would be contary to the statutory rules, which are careful to see that each side is informed of the evidence and given an opportunity to deal with it. (See s. 5 (2.), (3.) of the schedule to the Act and rr. 12 (6.), 14 and 15). Even if his opinion is expressed orally to the parties at the hearing it cannot be considered as evidence, because he cannot be cross-examined upon it, as the rules contemplate a witness may be (see r. 13), and an opinion expressed at that stage gives the parties no opportunity to consider it or comment on it, as the rules contemplate they should have in regard to any medical advice received by the tribunal. (See s. 5 (3.) of the schedule and r. 15.) The rules

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do not contemplate that the opinion of the medical member shall be evidence, except in the one case where the claimant consents to be medically examined by him. (See r. 16.)

I find myself, therefore, in agreement with the views expressed by Tucker J. in *Moxon* v. *The Minister of Pensions* (1), subject to the qualification expressed by the Court of Session in *Taylor* v. *The Minister of Pensions* (2) to the effect that, when the claimant, by leaving the views of the Minister or medical member unchallenged, expressly or impliedly admits the correctness of them, the admission is itself evidence.

Those being the principles, I proceed to consider the individual cases.

STARR *v.* THE MINISTER OF PENSIONS.

DENNING J. stated the facts and continued: The claimant claims on account of aggravation of glaucoma and also on account of high blood pressure (hyperpiesia). It was glaucoma which led to his discharge and that disease was not noted in any medical report made on him at the commencement of his war service. In respect of glaucoma, therefore, arts. 4 (2.) and 4 (3.) of the Order in Council apply. Notwithstanding the reports made by the naval doctors regarding the claimant the Minister rejected the claim. He did not disclose the source of his views, which were, of course, in direct conflict with those of the naval doctors. At the hearing of the appeal the evidence was all one way. Captain Starr had in his favour the presumption of art. 4 (3.) and evidence from two naval doctors (one of them an ophthalmic specialist) and his own doctor all of whom had had him under observation and examined him with care. On the other side were the unsupported statements in the decision of the Minister. The hyperpiesia did not lead to his discharge, and in respect of that disease art. 4 (2.) only applies. With regard to hyperpiesia, although Captain Starr had no presumption in his favour, he had the report of his own doctor in support. On the other side there was the unsupported statement in the decision of the Minister.

In my opinion the decision of the tribunal was erroneous in point of law and for two reasons: (1.) The tribunal put upon the claimant an onus which was not justified. The question was not whether there were "any set medical grounds supporting his contention" but whether there were any negativing it.

(1) [1945] K. B. 490.

(2) 1945 Sess. Notes 85.

(2.) There was no evidence to support the decision. The view that "strain does not worsen the condition, it either produces a "castrophe or it does not" was not supported by the opinion of any medical man. The only basis for it was the Minister's decision or the medical members' advice, neither of which can be regarded as evidence; and, indeed, it was in contradiction of the medical evidence which was before the tribunal.

On the facts as set out in the case stated by the tribunal, when proper regard is had to art. 4 (2.) and (3.) there was nothing sufficient to negative the claim of aggravation. I, therefore, allow the appeal, and the Minister must give a certificate of aggravation.

Appeal allowed.

NUTTALL v. THE MINISTER OF PENSIONS.

DENNING J., having stated the facts and referred to the findings of the Minister and the tribunal, said: The disability which led to the claimant's discharge was disseminated sclerosis which was not noted in any medical report made on him at the commencement of his service. Article 4 (3.) of the royal warrant, therefore applies. The reason given by the Minister for holding that the disability was not attributable to service puts the burden the wrong way. He said: "there was no "indication that any specific factor in service is responsible." The question was whether there was evidence that no factor in service was responsible. The tribunal also appears to have put the burden the wrong way when they said "From a medical point of view there is no "evidence to support a claim of attributability," the real question, of course, was whether there was any evidence to negative attributability. Inasmuch as the cause of disseminated sclerosis is the infection of the nervous system by some unknown agent, this was peculiarly a case in which the presumption availed the claimant and there was little enough to rebut it. The tribunal said that they were greatly influenced by the fact that "the disease is no more common in the army than in "civil life." That finding was based solely on a statement made by the medical member, which was not evidence and should have been disregarded by the tribunal. Even if it was admissible, it is difficult to see what bearing it has. A disease such as tetanus or tuberculosis may be no more common in the army than in civil life, but that does not prove that it is not

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attributable to war service. It seems to me plain that there was no evidence to negative the claim that the disease was attributable to war service; there was certainly not sufficient to rebut the presumption. I, therefore, allow the appeal and a certificate of attributability must issue.

Appeal allowed.

BOURNE v. THE MINISTER OF PENSIONS.

Denning J., after stating the facts, continued: The question stated in the case is whether there was sufficient evidence on which the tribunal could disallow the appeal. That means, in point of law, was there any evidence reasonably sufficient to rebut the presumption in the claimant's favour? The tribunal expressed the view that the opinion of Dr. Sims might well and with advantage, have been supported by more detailed reasons, and I agree with them, but the opinion expressed was authenticated by a medical man, and was, I think, evidence. The argument put forward by the claimant before the tribunal was really one going to the value of Dr. Sims evidence and was just the kind of point on which the tribunal could, and did take the advice of their medical member, and upon so doing they rejected the argument and dismissed the appeal. In my opinion there was sufficient evidence before the tribunal to enable them to come to the conclusion they reached, and I dismiss the appeal.

Appeal dismissed.

Solicitors for the claimants: *Fowler, Legg & Co.; Hyman Isaacs, Lewis & Mills for Herbert J. Davis, Berthen & Munro, Liverpool; Fowler, Legg & Co.*

Solicitor for the respondent: *The Treasury Solicitor.*

P. B. D.

Approved. Billingham v. Hughes. [1949] 1 K. B. 643

Approved. Billingham v. Hughes. [1949] 1 All E.R. 684.

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Mar. 19.

Atkinson J.

JORDAN v. THE LIMMER AND TRINIDAD LAKE ASPHALT COMPANY LIMITED AND OTHERS.

Damages—Personal injuries—Special damage—Loss of wages—Deduction of income tax from, not permissible.

Where a plaintiff in an action for damages for personal injuries claims, as an item of special damage, the amount of wages lost owing to his incapacity for work, in assessing the sum to which he is entitled no regard must be paid to the fact that a weekly sum for income tax is deducted from his wages, and the sum awarded must be the full rate of wages for which provision is made by the terms of his contract of employment.

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ACTION tried by Atkinson J.

The plaintiff, W. H. Jordan, brought an action against the defendants for damages for personal injuries sustained by him as the result of their negligence, which was not in issue. The plaintiff claimed 385*l*. 19*s*. 0*d*. as special damage including as an item therein, the loss of wages at 11*l*. 10*s*. 6*d*. a week for the thirty-two weeks during which he was incapacitated from working as the result of his injuries. The defendants agreed the amount of special damage, subject to the decision of the question whether, in assessing the amount of wages lost, the sum which would have been deducted weekly from the plaintiff's wages by his employers in respect of income tax, should be taken into account in arriving at the amount to which he was entitled under this head of his claim.

Murray for the defendants. The plaintiff is not entitled, as damages, to the gross amount of the weekly wages payable to him by the terms of his agreement with his employers. There is no direct authority on the point and the general principles as to damages should, therefore, be applied. In the *Columbus* (1) the law was stated by Dr. Lushington as follows : " I apprehend the general rule of law is, that where " an injury is committed by one individual to another, either " by himself or his servant, for whose acts the law makes " him responsible, the party receiving the injury is entitled to " an indemnity for the same." In *The Argentino* (2), Bowen L.J., said : " Speaking generally as to all wrongful acts what" ever arising out of tort or breach of contract, the English " law only adopts the principle of restitutio in integrum." The actual amount of the plaintiff's wages in the present case was reduced by the amount which had to be deducted from them as income tax by his employers under the existing income tax regulations made pursuant to s. 11 of the Finance (No. 2) Act, 1940. Under those regulations the employer has to make the necessary returns to the inland revenue authorities and to withhold a certain sum from the wage earner, who never touches that money in any way. It follows, therefore, that what the plaintiff is entitled to as damages is the amount he

(1) (1849) 3 W. Rob. 158, 162. (2) (1888) 13 P. D. 191, 200.

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would actually have received as wages if the accident had not taken place.

Vick K.C. and *G. W. Willett* for the plaintiff. No deduction should be made from the plaintiff's wages in assessing his damages under this head of claim. *Fairholme* v. *Thomas Firth and John Brown, Ld.* (1) is a clear authority against the defendants contention. There du Parcq J. held that in a claim for wrongful dismissal, in assessing the plaintiff's damages for the defendants breach of contract in dismissing him, no deduction should be made from the sum awarded, in respect of the income tax which he would have had to pay out of his salary if he had remained in the defendants' employment. If, in the present case the revenue authorities think they are entitled to anything out of the damages the plaintiff is awarded, they must take the necessary steps to recover it. No difference in principle has been introduced by the new income tax regulations. The person assessable to tax here is the plaintiff. If he is unable to work and earn his wages, his employers are under no obligation to make any deduction from them, and if a deduction on account of tax is made from the damages which the defendants are ordered to pay, they will not hand over the amount deducted to the revenue authorities.

ATKINSON J. The first question that arises for decision in this case is with regard to the special damage claimed by the plaintiff which is agreed at 385*l.* 19*s.* 0*d.* provided that his loss of wages is taken at the full figure of 11*l.* 10*s.* 6*d.* a week. The argument for the defendants is that if he gets that figure as damages, he will be receiving more than he would otherwise have had, since there would have been a deduction from his wages for income tax of 3*l.* or thereabouts a week, and they argue that their only liability is to compensate him for what he has lost. That is a very attractive argument, but I think that the point has been settled adversely to the defendants by the decision of du Parcq J. in *Fairholme* v. *Thomas Firth and John Brown, Ld.* (1). It is true that that case was decided before the existing regulations for the deduction of income tax from wages by an employer were in force, but precisely the same point was relied on there as in the present case. It was a case in which the plaintiff had been wrongfully dismissed and the damages were agreed at 18,000*l.*, subject to the

(1) (1933) 49 T. L. R. 470.

question whether there should be deducted from this amount the income tax which the plaintiff would have had to pay from his salary if he had remained in the defendants' employment. du Parcq J. assumed, without deciding the question, that any sum awarded to the plaintiff as damages would not be liable to income tax and/or surtax. It was therefore plain that the plaintiff would be receiving a sum of money from which no deduction had been made, although if he had actually earned the money he would have had to pay a substantial amount from it in income tax. It was contended for the defendants that if the amount of tax were not deducted the plaintiff would receive something more than his pecuniary loss. du Parcq J. came to the conclusion that the deduction should not be made. He said that the point was one "which must have arisen so frequently that it was "incredible that if sound, it never should have been taken, but "that apart from that consideration he would be reluctant "to give a decision which would seek to alter an inveterate "practice unless he were convinced that the practice was "inconsistent with principle and unjust; and he was not so "convinced in the present case. On the contrary, he was of "opinion that it was right in principle, in assessing damages as "between master and servant, to have no regard to the "servants liability to the Crown, which was truly res inter "alios acta."

I know that I am not bound by the decision of a judge sitting in a court of first instance, but I am very loth to depart from a principle which has been so clearly enunciated. I think that the true way of looking at the matter is to consider what were the plaintiff's contractual rights against his employers. His right was to receive 11*l.* 10*s.* 6*d.* a week in wages, and the mere fact that some of that would have gone to the inland revenue does not seem to me to affect the question. If the principle that an employer is now compelled to deduct the income tax has in any way altered the law, it may be that the inland revenue authorities may consider that they are entitled to make an assessment on a plaintiff who has recovered damages which include loss of wages, but that is a matter for them. If they do not take that view or if they make a claim and fail, that is so much the better for the plaintiff. Therefore, although the argument that the plaintiff will be getting more, if no deduction is made, than he would have got if he had not been injured, is, as I have said, an attractive one, I think

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the practice of ignoring this result is now too well established for a judge of first instance, at any rate, to interfere with it. Therefore, the sum I propose to award as damages will include the full sum of 385*l.* 19*s.* 0*d.* as the amount of special damage to which the plaintiff is entitled. The figure at which I have arrived, including special damage, is 985*l.* 19*s.* 0*d.* and there will be judgment for the plaintiff for that amount.

Judgment for plaintiff.

Solicitors for the plaintiff: *Ponsford & Devenish.*
Solicitors for the defendants: *Ince, Roscoe, Wilson & Glover.*

P. B. D.

C. A.

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Feb. 7, 8, 28.

Scott and Somervell L.JJ. and Vaisey J.

WILSON *v.* CHATTERTON.

Workmen's compensation—Injury by accident—"Arising out of" the employment—Epileptic—Agricultural worker—Fall into furrow full of water—Death by drowning—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1.

The principle that unless the weakness or illness of the workman is the sole cause of his injury or death by accident in the course of his employment the employer is liable to pay workmen's compensation applies to an epileptic as well as to a workman suffering from any other disability.

Where, therefore, an epileptic was working in a field when he had a fit, fell face downwards into a furrow full of water and was drowned:—

Held, that the employer was liable to pay workman's compensation.

Lander v. *British United Shoe Machinery Co.* (1933) 102 L. J. (K. B.) 768 overruled.

Young v. *Bristol Aeroplane Co., Ld.* [1944] K. B. 718, as to the jurisdiction of the Court of Appeal to refuse to follow a previous decision of its own, applied.

APPEAL from the judge of the Scunthorpe and Brigg county court.

The appellant's husband, who was employed as an agricultural worker and was an epileptic to the knowledge of his employer, had an epileptic fit while working in a beet field, fell face downwards into a furrow full of water and was drowned.

On an application under the Workmen's Compensation Act, 1925, the county court judge, holding that he was bound by the decision of the Court of Appeal in *Lander* v. *British United Shoe Machinery Co.* (1) to decide that the accident did not arise out of the employment, made an award in favour of the employer.

The appellant appealed.

Marven Everett for the appellant. The appellant is entitled to succeed in this case because the workman met his death in the course of his work in a particular place which was subject to risks attending his presence there. On the evidence this field was a dangerous place for the workman. In *Wicks* v. *Dowell & Co., Ld.* (2) a man, who was seized with a fit, fell down an open hatchway and was injured, and it was held that he was entitled to recover as the accident arose out of as well as in the course of his employment. The question of a place being a dangerous place must depend on the condition of the workman himself: see s. 1 of the Workmen's Compensation Act, 1925, which does not speak of injury arising out of and in the course of the employment caused to a normal workman. In *Lawrence* v. *George Matthews (1924), Ld.* (3) a commercial traveller in the course of his employment and whilst returning home was driving his motor cycle along a road in a gale when a tree which was blown down by the gale fell on him and killed him. It was held by the Court of Appeal that the accident arose out of and in the course of his employment. That was a case of a locality risk.

It is true that in *Lander* v. *British United Shoe Machinery Co.* (1), where a workman, who was subject to fits of epilepsy, fell in a fit and fractured his skull on the tiled floor of a lavatory on his employer's premises, it was held by the Court of Appeal that the employer was not liable; but that case was distinguished by the Court of Appeal in *Martin* v. *Finch* (4) where the deceased man, a labourer who was known to his employer to be subject to frequent epileptic fits, was told by his employer to take his tools on his bicycle to the field where he was to work next day as a land drainer, and he was found lying dead on the road leading to the field having apparently fallen from his bicycle in a fit. There it was held that the risk which the deceased ran was a risk due to his

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(1) (1933) 102 L. J. (K. B.) 768.
(2) [1905] 2 K. B. 225.
(3) [1929] 1 K. B. 1.
(4) (1937) 156 L. T. 447.

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particular employment and that the accident therefore arose out of the employment. *Lander's* case (1) was also distinguished in *Ironmonger* v. *Vinter* (2) where the deceased, who was known to his employer to be subject to epileptic fits, was found drowned at the bottom of a dyke which he had been employed to clean. Scott L.J. there said that the decision in *Lander's* case (1) ought to be regarded as limited to that particular case and that it did not contain any expression of principle which threw any doubt upon the principle laid down in *Wicks* v. *Dowell & Co., Ld.* (3) and *Martin* v. *Finch* (4). The latter case cannot be reconciled with *Lander's* case (1).

In the present case the employer knew of the workman's liability to epileptic fits and that was a risk of the employment. If an employer employs a workman who has some defect and the workman meets with an accident owing to that defect that accident arises out of and in the course of the employment. If *Lander's* case (1) cannot be distinguished, then it was wrongly decided in view of the principles laid down by the House of Lords and the Court of Appeal in other cases.

He also referred to *Powell* v. *Great Western Ry.* (5) and *Thom* v. *Sinclair* (6).

Beney K.C. and *Neil Lawson* for the employers, respondents. The present case is indistinguishable from *Lander's* case (1), and that case was rightly decided. It is too general a proposition to say that this accident would not have happened if the workman had not been employed on this field. Viscount Haldane pointed out in *Thom* v. *Sinclair* (7) that it was not sufficient to say that the accident would not have happened to the workman if his employment had not caused him to be in the place at which the accident occurred at the time of the occurrence, but a further condition was required, namely, that the injury should have arisen, not merely by reason of the workman's presence in a particular spot at a particular time, but because of some special circumstance attending his employment there. In *Allcock* v. *Rogers* (8), where a potman standing outside a public house cleaning a brass plate was injured by a bomb dropped by an enemy aircraft, the House of Lords held that the accident did not arise out of his employment, as there was no special danger attaching to the spot where he was told to work, and distinguished *Dennis* v. *A. J. White & Co.* (1) where a boy in the employment of a firm of builders, who was habitually sent on errands on a bicycle belonging to the firm, was ordered to go on a bicycle to fetch some plaster and while doing so came into collision with a motor car and was injured. It was held by the House of Lords in that case that the accident arose out of the employment. Russell L.J. in giving his judgment in *Lawrence* v. *George Matthews (1924), Ld.* (2) was referring to a danger which was proved to exist at the particular spot. The accident which happened to the workman in the present case might have happened to him outside his employer's field. The tests with regard to locality risks have to be looked at rather narrowly: see *Holden* v. *Premier Waterproof and Rubber Co., Ld.* (3) and *Brooker* v. *Thomas Borthwick & Sons (Australasia), Ld.* (4), a case of workmen being killed and injured through buildings having collapsed owing to a severe earthquake in New Zealand, the debris falling on the workmen.

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(1) 102 L. J. (K. B.) 768.
(2) (1938) 31 B. W. C. C. 90.
(3) [1905] 2 K. B. 225.
(4) 156 L. T. 447.
(5) (1939) 162 L. T. 35.
(6) [1917] A. C. 127.
(7) Ibid. 133.
(8) [1918] W. N. 96; 118 L. T. 386.

The county court judge was right in following *Lander's* case (5) and in holding that there was nothing on this field that made it dangerous. *Ironmonger* v. *Vinter* (6) is distinguishable from the present case because in that case it was found that the place was a dangerous place. *Martin* v. *Finch* (7) is also distinguishable from *Lander's* case (5). It cannot be the rule that anything that happens to an epileptic man is a risk of his employment. The falling down of an epileptic workman is something that may happen to him, but it is not a risk of his employment. It makes no difference whether or not the employer knew that the workman was an epileptic.

Marven Everett replied.

Cur. adv. vult.

Feb. 28. SCOTT L.J. read the written judgment of the court: In the present case the deceased workman met with an accidental death by drowning. At that moment he was on his employer's premises doing his employer's work in accordance with his duty. He was working in a beet field.

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(1) [1917] A. C. 479.
(2) [1929] 1 K. B. 1.
(3) (1930) 144 L. T. 519.
(4) [1933] A. C. 669.
(5) 102 L. J. (K. B.) 768.
(6) 31 B. W. C. C. 90.
(7) 156 L. T. 447.

There had been wet weather and the furrows in the field had become filled with water. He was an epileptic. This was known to his employer, but we do not think that knowledge increases or that ignorance would diminish the employer's liability. He had an epileptic fit and fell face downwards at a place where there was a rut half full of water. His death was due to asphyxia. No doubt owing to his fit he was unable to move his face out of the water. The place was dangerous to him, though there would have been no danger to a normally healthy person.

The county court judge made his award in favour of the employer, holding that, on the facts as found by him, the case was covered by the decision of this court in *Lander* v. *British United Shoe Machinery Co.* (1). In that case the workman, a known epileptic, had a fit while crossing a hard floor to the lavatory. He fell and fractured his skull on the hard floor. The floor was held to be not in itself dangerous to normal people. This court reversed the county court judge, holding that the workman could not recover ; distinguishing *Wicks* v. *Dowell & Co., Ld.* (2) on the ground that the workman in that case, also an epileptic, was required to stand at a place which was dangerous in itself, namely, an open hatchway down which he fell as a result of a fit. In *Martin* v. *Finch* (3) and *Ironmonger* v. *Vinter* (4), also cases of epileptics, *Lander's* case (1) was considered by this court but distinguished on the facts. Counsel for the appellant in the present case also sought, as we think unsuccessfully, to distinguish *Lander's* case ; but he also submitted that *Lander's* case was wrongly decided and was inconsistent with general principles laid down by the House of Lords and with other decisions of this court. We agree with that submission, and act upon the liberty given us by the decision of this court in *Young* v. *Bristol Aeroplane Co., Ld.* (5). There this court, whilst affirming the general rule that its own previous decisions are binding upon it, enunciated three exceptions of which the first two were : (1.) that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow ; and (2.) that the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

We have come to the conclusion that we are free, and indeed

(1) 102 L. J. (K. B.) 768.
(2) [1905] 2 K. B. 225.
(3) 156 L. T. 447.
(4) 31 B. W. C.C. 90.
(5) [1944] K. B. 718.

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bound, to refuse to follow *Lander's* case (1), the more so as the question at issue in the present appeal is of fundamental importance to the right understanding of the real basis of workmen's compensation which is formulated in the first two and a half lines of s. 1, sub-s. 1, of the Act of 1935 : " If in " any employment personal injury by accident arising out of " and in the course of the employment is caused to a workman, " his employer shall, " etc. It is essential that these words should be construed as a whole with due regard to the light thrown upon each word by the other words associated with it. As an illustration of this aid to construction and the danger of disregarding it we would point out that insufficient attention is sometimes given to the word " caused " and its proper meaning. Except that the original Act—that of 1897—was restricted to certain categories of workmen, there has been no change in the language used by Parliament in these two and a half lines. The Acts of 1897, 1906 and 1925 are in that respect identical, and that language has to be construed in its ordinary and popular meaning ; see per Lord Halsbury L.C. in *Brintons, Ld.* v. *Turvey* (2) following the same train of thought as he expressed in *Lysons* v. *Andrew Knowles & Sons, Ld.* (3). The same thought was subsequently expressed by Lord Loreburn (who dissented) in *Costello* v. *Owners of Ship Pigeon* (4), where, treating the legislation as remedial, he said : " We ought not to read into it an exception without " bearing in mind the nature of the remedy which is proposed " by the Act itself." A consequential principle of statute interpretation is involved. As was said by Mathew L.J. in *Smith* v. *Coles* (5) : " This Court would be slow to adopt an " interpretation of the Act which would introduce exceptions " that have not been made by the Legislature " ; and by Scrutton L.J. in *Wood* v. *Wood* (6) : " I am rather disposed to " think, although I do not know of any express authority for " it, that when you have an Act which is intended to lay " down a general principle, you construe the exceptions rather " against those who put them forward." In our view the natural meaning of the positive words in the two and a half lines in question entitles the appellant to judgment, and we see no sufficient ground for implying the exception upon which the judgment in *Lander's* case (1) and the judgment below in favour of the employer alike rested.

(1) 102 L. J. (K. B.) 768.
(2) [1905] A. C. 230, 232.
(3) [1901] A. C. 79, 85.
(4) [1913] A. C. 407, 413.
(5) [1905] 2 K. B. 827, 831.
(6) (1923) 93 L. J. (K. B.) 538, 542.

The general purpose of the legislation was, beyond all doubt, to put upon the employer an obligation to pay to his workman or the workman's representatives compensation for the result of personal injuries incidental to his employment, for which no action for damages lay either at common law or for breach of statutory duty. In this sense it made the employer an insurer, and the insurance aspect is important, for it helps to guide interpretation where the statutory language is open to doubt. The object of the legislation was essentially social, and it was no part of the purpose of Parliament to make the economic burden rest finally on the back of the individual employer. It was realized from the start that the risk would be re-insured, as in fact happened ; and through the insurance premiums, as an item in the cost of production or of services rendered, the community at large of course has had to carry the ultimate burden of the social reform in the price of goods or services. And at an early stage in the judicial interpretation of the legislation it was realized that the problem of ascertaining causation in the case of accidental injuries within the Act was analogous to the problem of ascertaining a loss under a policy of insurance. In other words the normal rule of causa proxima applied : see the judgments in the Court of Appeal in *Wicks* v. *Dowell & Co., Ld.* (1), where the court acted on the insurance principle. It is true that the words "arising out "of and in the course of the employment" impose two conditions precedent to the statutory obligation of the employer and that the words "out of" introduce a factor which might seem to throw back the inquiry into causation one step further from the final effect than the words "in the course of." But so to read the condition is, in our opinion, to mis-read it. It is only if the accidental injury has no causal connexion with the employment at all that it can be said not to arise out of it, though it may occur in the course of it. It is for that reason that the employer cannot escape liability by showing that some factor such as disease is a predisposing or even contributing cause of the injury ; he must show that it is the sole cause, as has been said frequently in decided cases.

The statutory language contains no words which qualify its absolute generality. Any person, man, woman or child, who is a workman, if employed, is entitled to compensation for injury accidentally caused, which arises out of and in the course of the employment. There is no pre-requisite of a medical examination to qualify him for admission to the benefit of the Act. There is no hint of an exclusion from those benefits of any person because at the moment of injury he is suffering from disease, or any physical or mental disability which may render him more prone to accidental injury arising out of his employment. There are many cases cited on pages 8 to 14 of Willis (37th ed.) which would have been decided adversely to the workman had such been the meaning of the statutory language. Indeed, the unqualified phrase "injury by accident" is inconsistent with such a reading of the statutory obligation on the employer. As was pointed out by Lord Loreburn L.C. in *Warner* v. *Couchman* (1), the words are "injury by accident," not "by an accident." It suffices if the injurious event is in any reasonable sense accidental; and that event must be judged from the workman's point of view: *Clover, Clayton & Co., Ld.* v. *Hughes* (2) and *Trim Joint District School Board of Management* v. *Kelly* (3). Both those decisions are in our view directly relevant to the present case: indeed, when considered in the light of *Fenton* v. *J. Thorley & Co., Ld.* (4) and *Fife Coal Co., Ld.* v. *Young* (5), they are in truth conclusive in favour of the workman. *Flanagan* v. *Ackers Whitley & Co.* (6); *McFarlane* v. *Hutton Brothers* (*Stevedores*), *Ld.* (7); and *Moore* v. *Tredegar Iron & Coal Co., Ld.* (8) are all decisions in which the Court of Appeal followed the principle, as we see it, laid down by the House of Lords in the decisions we have mentioned, and all three were cases in which the workman suffered from weakness or disease of the heart, and death occurred without his being subjected to any abnormal strain. The principle which emerges is that, unless the weakness or illness of the workman is the sole cause of the accidental injury to, or death of, the workman, the employer is liable. We can see no difference in principle between a bodily condition involving recurrent fits of epilepsy on the one hand, and on the other the various contributing causes unconnected with the employment which were features of the decisions we have cited. Some of the relevant decisions appear in Willis in the sub-division of his text entitled "Personal injury by accident" (p. 8 et seq.) and some in that of the words "Arising out of the employment"

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(1) [1905] 2 K. B. 225.

(1) [1912] A. C. 35, 38.
(2) [1910] A. C. 242, 245.
(3) [1914] A. C. 667.
(4) [1903] A. C. 443.
(5) [1940] A. C. 479.
(6) (1926) 19 B. W. C. C. 399.
(7) (1926) 96 L. J. (K. B.) 357.
(8) (1938) 31 B. W. C. C. 359.

(p. 44 et seq.), but the dividing line between the two topics is artificial.

What the court has to interpret is the whole of the complex conception expressed in the first two and a half lines of s. 1, sub-s. 1, and in our view it is dangerous and misleading to break that substantive provision up into bits, then to attempt to ascertain the meaning of each bit, and finally to add—or fail to add—the bits together in order to get the meaning of the whole. We infer that sick men and partially unfit and partly disabled men in employment were intended by Parliament to get the benefits of the Act just as much as the hale and hearty and perfectly fit men; for any intention of Parliament to exclude them must have found expression, and there is not a hint of it. The historic addition of industrial diseases was made not because diseased men had no right of recovery from their employer under the statutory provision of compensation for injury by accident, but because it so often happened in diseases of the types to which legislation was directed that the unfortunate workman did not know who was the employer for whom he was working when he first contracted the disease. It was chiefly, we think, to get over that difficulty that the disease provisions which now appear in Part II. of the Act of 1925 were passed.

In the case of *Ironmonger* v. *Vinter* (1), to which one of us was a party, it may be that the court did not realize how important and far reaching was the difference of principle between *Wick's* and *Lander's* cases, and that for that reason the court was content to distinguish *Lander's* case on the facts. The present appeal has, however, made it necessary to consider the issue of principle, and on principle we think that *Lander's* case should now be treated as bad law. On this basis, for the reasons we have set out, we consider that the facts in the present case bring it within the words of the Act and that the appeal should be allowed with costs and an award made in favour of the workman.

Appeal allowed.

Solicitors for appellant: *Pattinson & Brewer, for Williams & Co., Peterborough.*

Solicitors for respondent: *Tuck & Mann, for Davies & Thornton, Hull.*

H. A. P.

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(1) (1938) 31 B. W. C. C. 90.

REX *v.* GRONDKOWSKI.

REX *v.* MALINOWSKI.

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1946
Mar. 18, 25.

Lord Goddard C.J., Hilbery and Sellers JJ.

Criminal law—Joint indictment—Defence—Attack by one prisoner on another—Application for separate trial—Discretion of judge to grant or refuse—Discretion upheld where no miscarriage of justice results.

Where two persons are jointly indicted for a crime alleged to have been committed in pursuance of a common enterprise and an application for a separate trial is made on behalf of one of the accused persons on the ground that an essential element in his defence would consist in the making of an attack on his fellow prisoner, the granting or refusing of the application is a matter of discretion for the trial judge, and where such discretion has been judicially exercised the Court of Criminal Appeal will not interfere unless it appears that a miscarriage of justice has resulted either from the granting or the refusal of the application.

Rex v. *Barnes and Richards* (1940) 27 Cr. App. R. 154, considered **and explained.**

APPEALS AGAINST CONVICTIONS.

The appellants, Marian Grondkowski and Henryk Malinowski were jointly indicted on a charge of murdering one Reuben Martirosoff. The case for the prosecution, as indicated by the depositions and exhibits, was that the appellants were engaged in a common enterprise to rob the deceased man and to overcome resistance if offered. It further appeared that both the appellants admitted being present at the time of the killing, which was effected by shooting with a revolver; that they stripped the body and shared the booty, and that they stayed together at the same house. Each of the appellants sought to put the blame for the actual shooting on the other. An application was made on behalf of the second appellant that he should be tried separately. Croom-Johnson J., the trial judge refused the application and the appellants were tried jointly, convicted and sentenced to death.

The appellants appealed, the first appellant on grounds of misdirection, not calling for a report and the appellant, Malinowski, on the ground that the trial judge had exercised a wrong discretion in refusing to order separate trials in a case in which an essential part of one prisoner's defence was an attack on another prisoner, and that there had been a miscarriage of justice.

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Melford Stevenson K.C. and *Langdon* for the appellant Grondkowski.

Caswell K.C. and *Durand* for the appellant Malinowski. The trial judge was wrong in refusing the application for a separate trial made on behalf of this appellant. In coming to his decision he did not exercise his discretion judicially, and the effect of the appellants being tried jointly was to produce a miscarriage of justice. Where two persons are charged, and it is an essential part of the defence of one of them that he should accuse the other, a separate trial should be ordered. In *Rex* v. *Barnes and Richards* (1) Lord Hewart C.J., said that "where it appears that the essential part, or an essential part, "of one prisoner's defence is, or amounts to, an attack upon "another prisoner, then a separate trial should take place." (See also Archbold's Criminal Pleading 31st ed. 50.) The trial judge did not follow the authorities and gave no other grounds for exercising his discretion as he did.

[The court intimated that they desired to hear counsel for the Crown on this point only.]

Hawke for the Crown. This was a trial in which the whole case for the prosecution was that the two appellants were engaged in a common enterprise to rob the deceased man, accompanied by an intention to use violence if necessary. If this was a joint adventure, as the prosecution alleged, it was right that they should be tried jointly. In *Rex* v. *Gibbins and Proctor* (2) Darling J. said: "The rule is, that it is a matter "for the discretion of the judge at the trial whether two people "jointly indicted should be tried together or separately. But "the judge must exercise his discretion judicially. If he has "done so this court will not interfere, but that is subject to this "qualification. If it appeared to this court that a miscarriage "of justice had resulted from the prisoners being tried together "it would quash the conviction . . . . It is not enough to "say that counsel could have defended them more easily if they "had been tried separately." Where, as in the present instance, the whole case for the prosecution is one of a common design it would not be right that an order for separate trials should be made. No miscarriage of justice occurred in the present instance as the result of the order made.

THE COURT dismissed the appeals and stated that they would put into writing their judgment on the ground of appeal that separate trials should have been ordered.

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(1) (1940) 27 Cr. App. R. 154.

(2) (1918) 13 Cr. App. R. 134, 136.

Mar. 25. LORD GODDARD C.J., read the judgment of the court, as follows: In dismissing these appeals the court intimated that they would put into writing their judgment with regard to the ground of appeal raised by Mr. Casswell on behalf of the prisoner Malinowski that he ought to have been granted a separate trial. This was asked for at the trial but refused by Croom-Johnson J. When an application is made by a prisoner indicted jointly with another that he should be tried separately it must be made at the outset of the trial, though not necessarily before plea, and the judge can only act upon the material then before him, which ordinarily will be the depositions and exhibits.

In the present case, which was one of murder, it was clear from this material that the case to be presented by the prosecution was that the two prisoners set out together to rob the dead man and that the jury would be invited to find a common intention not only to rob but to overcome resistance if offered. It further appeared that both prisoners admitted that they were present at the killing which was effected by shooting with a revolver; that they afterwards stripped the dead body of the deceased's property, that they then went off with the booty which they shared and stayed together in the same lodging where the weapon was afterwards found in the room in which they were living. Each prisoner sought to put the blame for the actual shooting on the other and each denied that he intended to offer violence or even to rob. There was ample evidence from which the jury could infer a common intention to rob and to use such violence or other means as was necessary to effect that purpose. Which of the two actually fired the fatal shot was therefore immaterial, but, of course, the jury might have found that one or other was present with no intention of robbing the deceased but merely as a peaceful passenger in the car. Prima facie it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be. Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the

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same jury, who might see in one prisoner a harmless or nervous-looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime. Another instance would be the case of an indictment against husband and wife. The latter is no longer presumed in law to be acting under the coercion of her husband, but may nevertheless prove that she was. It would be very desirable, not only in the interest of the prisoners, but of justice, that the same jury should try them both, and it is by no means beyond the bounds of possibility that so far from finding that the wife acted under the coercion of her husband, it might be found that the husband was coerced by the wife, and if the same jury ought to try them, it would be absurd to say that they should be tried separately.

But it is said that there is now a rule of law that " where it " appears that the essential part ~~or an essential part~~, of one " prisoner's defence is, or amounts to, an attack upon another " prisoner a separate trial should take place." This is said to be the result of *Rex* v. *Barnes and Richards* (1), where Lord Hewart C.J., in a judgment, which had not been reserved, used the words we have just quoted, in giving the judgment of the court. In our opinion, that case is not to be read as laying it down that wherever it appears that one prisoner is going to lay the blame on the other, or another, there must be separate trials. The law is, and always has been, that this is a matter of discretion for the judge at the trial. The court so stated the law in this very case, and quite recently in *Youth* v. *Reg.* (2), the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding judge. The discretion, no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it.

There is no case in which this has ever been laid down, and in the opinion of the court it would be most unfortunate and contrary to the true interests of justice if it were. The matter was well and, as we think, quite correctly dealt with in *Rex*

(1) (1940) 27 Cr. App. R. 154. (2) [1945] W. N. 27.

v. *Gibbins and Proctor* (1), where Darling J., delivering the opinion of the court, said ; " The rule is, that it is a matter for " the discretion of the judge at the trial whether two people " jointly indicted should be tried together or separately. " But the judge must exercise his discretion judicially. If he " has done so this court will not interfere, but that is subject " to this qualification. If it appeared to this court that a " miscarriage of justice had resulted from the prisoners being " tried together it would quash the conviction. Here it is " clear that Roche J. exercised his discretion ; he separated the " defences carefully, pointing out what was evidence against " one prisoner, and not against the other. It is not enough to " say that counsel could have defended them more easily if " they had been tried separately. There is no ground for " thinking that there was any miscarriage of justice. There " may have been many things made clear to the jury which " would not have been made clear if the prosecution had been " embarrassed by having to deal with the two cases separately. " The whole story was before the jury of what went on in the " house where the two appellants lived together. There is no " ground for thinking that either of them was improperly " prejudiced by their being tried together."

In our opinion, the court in *Rex* v. *Barnes and Richards* (2) are not to be taken as meaning more than that an attack by one prisoner on another is a matter which the court should take into account in considering whether to grant a separate trial, not that in those circumstances it is bound to. The dearth of authority on the subject in former days is probably due to the fact that the granting or withholding of a separate trial has always been treated as discretionary. In a passage in the Reports of Kelyng J., para. 8, under the heading " High-" Treason," it is stated that where prisoners sever in their challenges the panel may be severed, which means that the court could try them separately. So from that it appears that if the court of its own motion, and not on the motion of the prisoners, orders a separate trial, it is no ground for arresting judgment.

The case of *Reg*. v. *Ahearne* (3), a case in the former Irish Court of Criminal Appeal, shows that the court has a discretion to allow a case to proceed against one of several conspirators although the others, who have appeared and pleaded, have

(1) (1918) 13 Cr. App. R. 134, 136.

(2) 27 Cr. App. R. 154.

(3) (1851) 6 Cox C. C. 6.

not been tried. The court refused to arrest the judgment, holding apparently that it was within the discretion of the judge to allow the case to proceed against one prisoner only. We may also refer to *Reg.* v. *Bradlaugh and Others* (1). There, the defendant, who was indicted along with two others for publishing a blasphemous libel, applied for a separate trial on the ground that his co-defendants had already been convicted and were serving a sentence for publishing a similar libel in another number of the same newspaper, and that this would prejudice him in his defence, especially as he desired to call them as witnesses. Lord Coleridge C.J., granted a separate trial because he thought there was a possibility of prejudice resulting to the defendant if he were tried along with two persons already convicted for substantially the same offence. We mention this only as illustrating another ground which a judge may properly take into account when dealing with such an application. The real test, after all, which must be applied by a court of criminal appeal on a matter which is essentially one of discretion is, has the exercise of the discretion resulted in a miscarriage of justice? If improper prejudice has been created whether by a separate or by a joint trial—for as we showed at an earlier stage of this judgment prejudice might be caused to one prisoner by ordering a separate trial on the application of the other—this court will interfere but not otherwise. In this case we are satisfied that there has been no miscarriage, and this ground of appeal therefore fails.

Appeals dismissed.

Solicitor for the appellants: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

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(1) (1883) 15 Cox C. C. 217.

P. B. D.

Distinguished. SACHS *v.* MIKLOS. **[1948] 2 K. B. 23**

Followed. MUNRO *v.* WILLMOTT. [1949] 1 K. B. 295

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Jan. 24, 25, 28, 29; *Feb.* 20.

Scott and Tucker L.JJ. and Evershed J.

ROSENTHAL *v.* ALDERTON AND SONS, LIMITED.

Detinue—Measure of damages—Value of goods—Date at which assessable.

In an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason.

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Appeal from His Hon. J. G. Trapnell K.C., official referee.

The facts, so far as material to this report, were as follows: Before the year 1940, the plaintiff, S. Rosenthal was tenant to the defendants, Alderton and Sons, Ld., of certain rooms in premises at 153 Fleet Street, London, where he carried on the business of a hairdresser. In June, 1940, the plaintiff surrendered his tenancy and, by arrangement with the defendants left on the premises certain goods belonging to him. In 1943, after his return from a period of military service, the plaintiff found that the goods were missing, some of them having been sold by the defendants. On October 6, 1943, the plaintiff, through his solicitors demanded the return of the goods and, on the defendants' refusal to comply, brought an action against them claiming the return of the goods and, in the alternative, the payment to him of their value and damages for their detention. The official referee held that the circumstances in which the goods were left with the defendants created the relationship of bailor and bailee between the parties. He gave judgment for the plaintiff and, in assessing the value of the goods not returned, he took their value as at a date between that of the issue of the writ and his judgment, and awarded the plaintiff a sum based on such value.

The defendants appealed.

Lloyd-Jones for the appellants. The official referee was wrong in assessing the value of the goods not returned as at a date some time between the date of the issue of the writ and the date of his judgment. Their value should be assessed at the time of the wrongful act; that is, at the time of the demand for their return by the plaintiff and the refusal by the defendants. In *Reid* v. *Fairbanks* (1), an action for the conversion of a ship and stores, the court expressed the view that the proper principle on which to assess the damages, would be to take the value of the ship and stores as on the date of the conversion. In *The Arpad* (2) where there was a claim for damages in respect of a short delivery of wheat the Court of Appeal held that the true measure of damages was the value of the goods at the date of the non-delivery. It is submitted that *Greening* v.

(1) (1853) 13 C. B. 692.

(2) [1934] P. 189.

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Wilkinson (1), in which Abbott C.J. said, in an action for conversion, that the jury were not limited to find as damages the mere value of the property at the time of the conversion but, might, in their discretion find, as damages, the value at any subsequent time, ought not to be followed. In *Leader and Another* v. *Rhys* (2), decided thirty-six years later, it was held that in detinue damages are only recoverable for the time of the detention prior to the issue of the writ. If the plaintiff is right in saying that damages should be assessed on the value of the goods as at the date of judgment, by delaying the taking of proceedings he might increase his damages, if the value of the goods had risen between the date of the refusal to return them and the date of the judgment. In any event the value of the goods which were sold by the defendants ought to be assessed as at the date of the sale.

Fortune for the respondent. In detinue or conversion the damages should be assessed as at the date of the judgment since they should at least amount to the loss suffered by the plaintiff in consequence of the defendants wrongdoing. It cannot be right that the damages should be assessed as at the time when the cause of action accrues. That date may be unknown to the owner of the goods and if the value of the goods fell between that date and the date of judgment, it might leave the innocent owner to bear a heavy loss in respect of the goods. *Greening* v. *Wilkinson* (1) was correctly decided and there is no reason why it should not be followed. There, Abbott C.J. said " the price of the article on the day of the " conversion is by no means a criterion of the damages." [He also referred to *Lilley* v. *Doubleday* (3), *James Morrison & Co., Ld.* v. *Shaw Savill and Albion Co., Ld.* (4), *Bodley* v. *Reynolds* (5) and Mayne on Damages, 10th ed. p. 385.]

Cur. adv. vult.

Feb. 20. The judgment of the court was read by EVERSHED J. [After referring to the facts and stating that the court agreed with the finding of the official referee that the arrangement made between the plaintiff and the defendants with regard to leaving the goods on the defendants' premises constituted an entrustment of the goods by the plaintiff into the possession and control of the defendants and amounted in law to a bailment, the judgment continued :] The defendants contended that the learned official referee had erred in law in his assessment of the value to be paid for the goods in default of their return. It was said that he had fixed the value as at the date of trial or at some date subsequent to the issue of the writ or the accrual of the cause of action and that this was erroneous. The defendants' contention was that a demand by the plaintiff for the return of the goods having been refused by the defendants several months before the issue of the writ, the plaintiff's cause of action arose on the date of such refusal ; and that the proper assessment of the value of such of the goods as have not been returned by the defendants should therefore have been in accordance with their value on the date when the cause of action arose which was, (as it was claimed), notoriously less than their value as assessed by the official referee after action brought.

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(1) (1825) 1 C. & P. 625.
(2) (1861) 10 C. B. (N. S.) 369.
(3) (1881) 7 Q. B. D. 510.
(4) [1916] 2 K. B. 783.
(5) (1846) 8 Q. B. 779.

In an action of detinue the value of the goods claimed but not returned ought, in our judgment, to be assessed as at the date of the judgment or verdict. A successful plaintiff in an action of detinue was, under the old practice, entitled to judgment for the re-delivery of the goods or, in case they were not returned, to their value together with damages and costs ; and such value was either assessed by the jury at the trial or by the sheriff upon an inquest (see e.g., Viner's Abridgement, 2nd ed., vol 8., p. 40 ; Bullen and Leake, Precedents of Pleadings, 3rd ed., p. 313 ; *Phillips* v. *Jones* (1), per Parke B.). Unless the alternative methods of assessing value were liable to produce substantially different results, the time at which the value was in each case to be determined, must have been the date of the verdict. It should be added that until the power was given by s. 78 of the Common Law Procedure Act, 1854 (now contained in R. S. C. Or. 48) the common law courts could not compel the return of the specific chattels claimed and the defendant had, in effect, under the old forms of judgment, the option of retaining the chattels for himself and paying their value as assessed or found. It is further to be noted that the action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed : (see, e.g., Viner's Abridgment, vol. 8, p. 23 ; Holdsworth, History of English Law, vol. 7, pp. 438, 439.) It was, and still is, of the essence of an action of detinue that the plaintiff maintains and

(1) (1850) 15 Q. B. 859, 867, 868.

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asserts his property in the goods claimed up to the date of the verdict. On this ground it has been held that a judgment in trover, if unsatisfied, is no bar to an action of detinue in respect of the same goods, *Brinsmead* v. *Harrison* (1), the plaintiff, in the absence of satisfaction, not having been divested of his property in the goods claimed.

In our judgment an assessment of the value of the goods detained (and not subsequently returned) at the date of the accrual of the cause of action (i.e., of the refusal of the plaintiff's demand) must presuppose that on that date the plaintiff abandoned his property in the goods: and such a premise is inconsistent with the pursuit by the plaintiff of his action of detinue. The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes and continues to be, wrongful, Moreover, the plaintiff may recover damages in respect of the wrongful " detention " after that date, e.g., where the plaintiff has suffered loss from a fall in value of the goods between the date of the defendant's refusal and the date of actual return, (see *William* v. *Archer* (2)), and such damages must equally continue to run until the return of the goods or (in default of return) until payment of their value. There is (as appears from the forms of judgment already mentioned) a clear distinction between the value of the goods claimed in default of their return and damages for their detention, whether returned or not. The date of the refusal of the plaintiff's demand is the date from which the latter commence to run, but appears to be irrelevant to the former and cannot convert a claim for the return of the goods into a claim for payment of their value on that date.

In the present case the official referee awarded the sum of 25*l.* for damages for detention. This award was, (in accordance with the forms of judgment to which we have referred), wholly distinct from his assessment of the value of the goods not returned. In this court neither party has sought to challenge the official referee's award of damages. As regards the value of the goods (other than those which the defendants were willing and able to return or had returned) the official referee made his assessment on the basis of evidence of such value on dates between the date of the writ and the date of his judgment. It has not been suggested that there was any fall in the value between those dates and the plaintiff is willing to accept the value so found in satisfaction of that part of his claim. Moreover

(1) (1871) L. R. 6 C. P. 584.

(2) (1847) 5 C. B. 318.

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this is not a case of valuable securities or goods with an ascertainable market price at a particular date, but concerns second hand barber's furniture and utensils in a period when it is obvious that no one could attempt to do more than give an approximate estimate of value, and in fact neither expert attempted to prove any fluctuation of value over a period of a few months one way or another. The official referee, acting as a jury, had to come to the best conclusion he could on the material before him, which was necessarily lacking in precision and there is nothing to show that the figure found by him was, in respect of any period between the date of the writ and the date of the verdict, either too low or too high. On the other hand, for the reasons which we have stated, it would in a claim of detinue be wrong, in our judgment, to assess the value of the goods not returned at some date prior to that of the issue of the writ and thereby permit the plaintiff to lose and the defendants to gain by reason of their continuing wrong. This ground of appeal therefore also fails.

The defendants finally submitted that in any event the value of certain of the goods which they had in fact sold could not be assessed at any higher value than at the date of sale. In other words they say " We have proved that we converted some " of your goods and therefore we can have the benefit of any " lower value prevailing at the date of conversion." It is, however, clear that it is no answer for a bailee, when sued in detinue, to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor—cf. *Wilkinson* v. *Verity* (1). It seems to us that the defendants are, in effect, saying " Your real remedy is in conversion." But the bailor can, in such circumstances, elect to sue in detinue (at any rate where he was not aware of the conversion at the time), and there is no reason why the value of the goods in fact converted should be assessed on a different basis from the value of the goods which the bailee has not converted but which for some other reason he fails to re-deliver. In our view this contention likewise fails, and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff: *J. N. Mason & Co.*
Solicitors for the defendants: *Hardcastle Sanders & Co.*

(1)(1871) L. R. 6 C. P. 206.

P. B. D.

1946
Jan. 17, 25.

Humphreys,
Lewis and
Henn Collins JJ.

CROYDON GAS COMPANY *v.* CROYDON COUNTY BOROUGH RATING AUTHORITY.

Rating—Gas undertaking—Hereditaments in several rating areas—Profits basis—Tenant's remuneration—Tenant's capital—Uninvested balances of benevolent funds used in undertaking not to be deducted.

A gas company, whose undertaking extended into several rating areas, were assessed for rates in one of those areas on the principle of the profits basis. On appeal to quarter sessions, the court, in calculating the tenant's remuneration to be deducted from the gross profits, allowed 12½ per cent. on a sum obtained by deducting from the total tenant's capital (being the capital estimated to be required for the conduct of the undertaking) the amount of certain uninvested balances of benevolent funds established by the company for the benefit of their employees, which uninvested balances were, at the discretion of the trustees of those funds, left with the company at five per cent. or less interest and used by the company in the undertaking. Quarter sessions deducted the uninvested balances on the ground that the company were able to obtain the use of such balances at less than 12½ per cent. interest :—

Held, that neither the source from which nor the price at which the tenant could obtain his capital was a relevant consideration in estimating the capital required for the conduct of the undertaking and that the uninvested balances of the benevolent funds ought not to have been deducted in arriving at the tenant's remuneration.

Held, also, that quarter sessions, having given effect to an irrelevant consideration, had made a mistake of law in respect of which an appeal lay to the High Court.

CASE STATED by the Recorder of Croydon.

In the valuation list for the county borough of Croydon the Croydon Gas Company were assessed as the occupiers of certain hereditaments consisting of gas mains, services, works, workshops and premises in the rating area of the county borough of Croydon in the total sum of 45,033*l*. The company made proposals to amend the list by reducing that figure and the assessment committee considered them but dismissed them. The company then appealed to quarter sessions.

At the hearing it was proved or admitted that the company's undertaking extended into eight rating areas; that the company had established certain funds for the benefit of their employees; and that during the year 1939 the average uninvested balances standing to the credit of those funds totalled 66,311*l*. It was further proved or admitted that it was the practice for the trustees of the several funds, in accordance with the rules governing the funds, at their discretion to leave with the company the uninvested balances and for the company to pay interest at four per cent. per annum or less to one of the funds and five per cent. per annum to the others. It was agreed that the hereditaments in question were by law requried to be valued on the principle known as "the profits basis" as explained in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1).

The Recorder held that the total rateable value of the whole undertaking of the company was 55,121*l*., and that the rateable value of the hereditaments to which the appeal related totalled 38,624*l*., and he therefore allowed the appeal and directed that the valuation list should be amended accordingly.

The Recorder also found that a proper tenant's remuneration (including interest risk and profit) could on the facts of the case be ascertained by estimating the capital required by the tenant for the conduct of the undertaking and allowing the tenant 12½ per cent. on that estimated capital. The company submitted a valuation in which no deduction was made in arriving at the estimated tenant's capital on account of the uninvested balances of the funds being available for use by them in running the undertaking, whereas the rating authority submitted a valuation in which an amount of 66,311*l*. had been so deducted.

The Recorder adopted the figures shown by the rating authority and in determining the tenant's capital deducted from the total tenant's capital of 730,014*l*. the balances of the funds, 66,311*l*., thus arriving at the sum of 663,703*l*.

The company applied to the Recorder to state a case for the opinion of the court on the point whether in computing the tenant's capital it was correct to deduct the sum of 66,311*l*. They contended that a tenant of the undertaking could not assume that he would have the use of the balances of the funds for any particular period or at all; that if he had the use of such balances they would be at his risk in the business in the same way as any other borrowed capital; and that the source from which a tenant raised capital required for the conduct of the undertaking was irrelevant.

(1) [1926] A. C. 331.

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The rating authority contended that there was no ground for thinking that the practice of leaving the balances of the funds with the company was likely to be changed ; that such practice would be an ordinary incident of the running of the undertaking and that the amount of capital which the hypothetical tenant would have to supply would be reduced by the total of such balances ; that the company were the only (or the most probable) hypothetical tenants to be considered and it would be unreasonable to decide that the tenant would expect remuneration at 12½ per cent. on such balances ; that the question was one of fact and not of law ; and that if it were a question of law, it was correct in law to deduct the balances in computing the tenant's capital.

The Recorder, in so far as it was a question of fact (which he was of opinion that it was) found, and in so far as it was a question of law held, that a deduction of 66,311*l.* in respect of the balances of the funds should be made in arriving at the amount of the tenant's capital, but stated this case for the opinion of the High Court.

Comyns Carr K.C. and *Harold Williams* for the appellant company. The first question is whether the question in issue is one of fact or of law. It has been held that in assessing an undertaking like that of the appellants the profits basis must be applied and that is usually done by taking the capital required by the hypothetical tenant to run the undertaking and allowing him a certain amount of interest. Then the amount of the gross receipts is ascertained and from such amount are deducted the expense of earning such receipts, the deductions provided for by statute, and an estimated amount for tenant's profit including interest on capital : *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1) ; *Port of London Authority* v. *Orsett Union Assessment Committee* (2) ; *St. James' & Pall Mall Electric Light Company* v. *Westminster Assessment Committee* (3). If this method has been applied, then the question whether it has been properly applied is a question of law : *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (4). Here the Recorder has taken into consideration something which is quite irrelevant, namely, the source from which the hypothetical tenant has borrowed part of his capital. It cannot matter whether the

(1) [1926] A. C. 331, 338.
(2) [1920] A. C. 273, 281.
(3) [1934] A. C. 33, 41.
(4) [1901] A. C. 175, 183.

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company have borrowed money from trust funds or from the bank or anywhere else, nor can it matter at what rate of interest they were able to borrow. [Counsel referred to *Railway Assessment Authority* v. *Southern Ry. Co.* (1) and *Metropolitan Water Board* v. *Chertsey Assessment Committee* (2).]

Frederick Grant K.C., *Percy Lamb* and *J. Malcolm Milne* for the rating authority. No question of law arises at all in this case. The only question is how much ought to be allowed as the tenant's share of the profits and that is entirely a question of fact. There is no authority as to how that is to be calculated and the Recorder was not bound to have regard to the tenant's capital. He only had to form his opinion as to how much profit the hypothetical tenant would make and for that purpose the company could be regarded as a possible tenant : *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (3). The Recorder was entitled to take into consideration every factor which was what Scott L.J. called " economically relevant " in *Robinson Brothers (Brewers), Ld.* v. *Houghton and Chester-le-Street Assessment Committee* (4), and he was therefore entitled to consider the circumstances of the use by the company of the uninvested balances of their benevolent funds. [Counsel also referred to *Railway Assessment Authority* v. *Southern Ry.* (1).]

Comyns Carr K.C. replied.

Cur. adv. vult.

Jan. 25. HENN COLLINS J. read the judgment of the court : This matter comes before us upon a case stated under s. 31 of the Rating and Valuation Act, 1925, by the learned Recorder of the county borough of Croydon. The Croydon Gas Company sought a reduction of the rateable value set upon certain hereditaments of which they were the occupiers in that borough. It is common ground that these are hereditaments to be valued on the principle known as the profits basis, as explained in *Assessment Committee of Kingston Union* v. *Metropolitan Water Board* (5). One step in the application of that principle requires the ascertainment of the capital sum required by the tenant for the conduct of the undertaking, and the next step is the application to that sum of an appropriate

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(1) [1936] A. C. 266.
(2) [1916] 1 A. C. 337, 347.
(3) [1926] A. C. 331, 342.
(4) [1937] 2 K. B. 445, 471.
(5) [1926] A. C. 331.

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percentage for his remuneration. What that capital sum should be, and what is the appropriate percentage to apply, are clearly questions of fact: see *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (1) and *Railway Assessment Authority* v. *Southern Ry. Co.* (2).

The learned Recorder fixes the proper percentage at 12½ per cent. in para. 9 of the case, while in para. 10 he names the total tenant's capital as being 730,014*l.* The expression "total "tenant's capital" can only mean, and does in the sense in which it is used in the case mean, the capital sum required for the conduct of the undertaking. The amount of it cannot be affected by considering the sources from which it is, or can be, provided. It is immutably fixed by the finding that that sum is required to work the business. Yet, in the same sentence in which the total tenant's capital is said to be 730,014*l.*, the learned Recorder says that for the purpose of applying the 12½ per cent., which in his view the facts justify, the 730,014*l.* is to be taken as being 663,703*l.* But of two things, one, either 730,014*l.* or 663,703*l.*, is right, and, if one is right, the other must be wrong. The capital sum required cannot possibly vary with the particular tenant, and to assume that it can must be wrong. Whether that is by reason of a mistake of law, or of fact, is another question. No doubt the learned Recorder's ultimate figure can be arrived at either by applying 12½ per cent. to 663,703*l.* and allowing the interest actually paid on the difference between that sum and 730,014*l.* as a working expense as the Recorder has done, or by applying some less percentage than 12½ per cent. to the capital assumed to be employed. In other words, he might have found that not 12½ per cent. but some lower percentage was appropriate in this case. There is nothing in the profits basis which fixes 12½ per cent. or any other percentage as the tenant's share, but we think that, whatever be the proper percentage, it must be applied to the whole of the capital which the tenant is assumed to put into the business, because, otherwise, in the same breath one is saying either that the capital, fixed as right, is wrong, or that the percentage, fixed as right, is wrong. The learned Recorder found himself in that dilemma. He had to choose one or other of those two alternatives, either of them wrong according to his own findings, and he chose the former. He has explained why he did so, so there is no need to speculate. It was not because any less sum than 730,014*l.* was needed in the business, but because the tenant could lay his hands upon part of that sum by paying less than

(1) [1901] A. C. 175, 180.

(2) [1936] A. C. 266, 288.

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12½ per cent. for it. If that was a relevant consideration in arriving at the amount which the tenant would require to put into the business, then a conclusion of fact would have been arrived at without any mistake in law. But in our view to give effect to irrelevant facts involves a mistake of law: *Port of London Authority* v. *Orsett Union Assessment Committee* (1). We also think the source from which, and the price at which, a tenant can get his capital, has no bearing upon what amount is required. We, therefore, are of opinion that the question propounded for us by this case is a question of law, and should be answered in the negative.

This view seems to us, incidentally, to tally with the good sense of the matter. The funds, the existence of which have been allowed to increase the rateable value of the hereditaments, are in the hands of trustees who may invest them (no doubt within limitations which have nothing to do with this case) as they please, and lend them to the tenants of the undertaking or not at their discretion, in accordance with the rules governing the funds as stated in the case. The tenant cannot borrow from them as of right and they are no inherent element in the undertaking, such as is the right to levy a "deficiency rate," or a compulsory sinking fund. We do not know, because there is no finding to that effect, that the same facilities would be available to any other tenant, though there may be reason to suppose that if making the balances available to the tenant is going to increase the amount which the tenant has to pay in rates, the tenant may find it better not to borrow, or the trustees not to lend.

Appeal allowed.

Solicitors for the appellant company: *Blyth, Dutton & Co.*

Solicitors for the rating authority: *Sharpe, Pritchard & Co., for E. Taberner, Town Clerk, Croydon.*

(1) [1920] A. C. 273, 281, 282.

H. A. P.

1946
Jan. 29, 30.

Denning J.

SHIPP *v.* MINISTER OF PENSIONS.
MINISTER OF PENSIONS *v.* PRETTY.

Pensions—War service—Non-attributable disease—Aggravation—"And "remains aggravated"—Appeal—Functions of Minister and Appeal Tribunal—Pensions Appeal Tribunals Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 39), *s.* 1, *sub-s.* 1—*Royal Warrant of December,* 1943 (Cmd. 6489), *Art.* 4 (1.).

By Art. 4 (1.) of the Royal Warrant of December, 1943, the disablement of a member of the military forces is to be accepted as due to war service provided it is certified, inter alia, that it is due to a wound, injury or disease which " existed before or arose " during war service and has been and remains aggravated " thereby."

By s. 1, sub-s. 1, of the Pensions Appeal Tribunals Act, 1943, where any claim in respect of the disablement of any person made under the above-mentioned Royal Warrant is rejected by the Minister on the ground that the injury " does not fulfil the " following conditions, namely, that it existed before or arose " during war service and has been and remains aggravated thereby," an appeal lies to a Pensions Appeal Tribunal " on the issue whether " the claim was rightly rejected on that ground."

The words " and remains aggravated " in the above provisions must be read as meaning " and remains aggravated or remained " aggravated during the period of disablement." Those provisions therefore apply to past as well as to existing disablement and aggravation and enable a certificate to be given where disablement is not claimed to be continuing or has been found not to be so. The issue before the Minister is whether to grant or reject the claim and the issue before the Tribunal is whether the claim was rightly rejected and no more.

An appeal on a question whether a disease remains aggravated by war service, being not solely a medical matter, is properly brought to a Tribunal under s. 1 and not under s. 5 of the Pensions Appeal Tribunals Act, 1943.

Appeals by way of cases stated from Pensions Appeal Tribunals.

These two appeals raised the same question of law, namely, the proper interpretation and application of art. 4 of the Royal Warrant of December, 1943 (1), and s. 1 of the Pensions Appeal

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(1) Royal Warrant of December, 1943, Art. 4: " (1.) The disablement or death of a member of " the military forces shall be " accepted as due to war service " for the purposes of this Our " Warrant provided it is certified " that—(*a*) the disablement is due " to a wound, injury or disease " which—(i.) is attributable to " war service; or (ii.) existed before or arose during war service " and has been and remains " aggravated thereby . . . ."

Tribunals Act, 1943 (1), in a case where disablement is due to a disease which existed before or arose during war service and "has been and remains aggravated thereby."

In Shipp's case, the claimant's disability, defective vision, originated in infancy. He was examined for enlistment in the military forces in April, 1940, when he was placed in Grade III. (vision) and B 3 apart from visual defect. On May 3, 1940, he was posted to the Army Mechanical Pioneer Corps and put to heavy manual work. After three months he complained that his sight had deteriorated and he was examined by an eye surgeon who found that one eye was slightly better but that the other eye was worse than on his previous examination. He was discharged from the army on December 5, 1940. He made a claim to a pension on December 4, 1940, but it was rejected by the Minister on March 18, 1941. On June 1, 1944, a welfare officer on behalf of the claimant notified the claimant's desire to go before a medical board with a view to substantiating his claim to a pension, but on June 29, 1944, the Minister stated that he could find no grounds for awarding a pension. The claimant submitted a notice of appeal and the appeal was heard on April 11, 1945. The Appeal Tribunal found as a fact that there had been some deterioration in the sight of the claimant's right eye during service and some acceleration of the process by service, but they were of the opinion that the worsening of the eye could not have been accelerated by more than a few months and that the period during which the eye was in a worse condition as a result of service at an earlier date than it might otherwise have been could not have been longer than three years. They therefore found that the claimant's disability did remain aggravated by service until December, 1943, but no longer, and allowed the appeal in respect of the earlier part of the period covered by the claim.

The claimant contended that that decision was erroneous and obtained leave to appeal to the High Court.

(1) Pensions Appeal Tribunals Act, 1943, s. 1, sub-s. 1: "Where "any claim in respect of the disablement of any person made "under any such Royal Warrant ". . . . . as is administered by the "Minister is rejected by the "Minister on the ground that the "injury on which the claim is "based—(*a*) is not attributable "to war service; and (*b*) does not "fulfil the following conditions, "namely, that it existed before or "arose during war service and "has been and remains aggravated thereby . . . . an appeal "shall lie to a Pensions Appeal "Tribunal . . . . on the issue "whether the claim was rightly "rejected on that ground."

The Tribunal stated a case in which they propounded three alternatives:

(1.) To treat the claim and its rejection and the issue thereon as relating only to the date when the act of rejection was performed and to disallow the appeal;

(2.) To accept the claim and its rejection as in part retrospective and to date back both to the date of the claimant's discharge and then to treat the issue as relating only to that single date of the supposed act of rejection, at which date in their opinion the claimant's disability did remain aggravated by service and to allow the appeal; and

(3.) To treat the issue, like the claim and its rejection, as relating primarily to a state of affairs over a period of time and to view the claim as one that was rejected and as giving rise to a continuing issue as to whether the disability had been and remained or had been but did not remain aggravated by service.

The Tribunal stated that they had adopted the last course and that the question for the court was which of the above interpretations or what other interpretation of s. 1 of the Act was correct.

In Pretty's case, the claimant was embodied as a member of the military forces on December 17, 1942, and was discharged on September 28, 1943, suffering from a duodenal ulcer which was not noted on his medical report at the commencement of his war service. On September 22, 1944, a Pensions Appeal Tribunal decided that the disease was not attributable to war service, but that it existed before or arose during war service and had been aggravated by such service and on September 28, 1943, remained aggravated thereby. He was awarded a pension at thirty per cent. from September 29, 1943, to September 21, 1944. The claimant then applied for a further award, but the Minister rejected the claim. The claimant appealed to a Pensions Appeal Tribunal. The appeal was heard on May 16, 1945, and on June 8, 1945, the Tribunal gave their decision that they had no jurisdiction to decide whether the claimaint's disability remained aggravated on September 22, 1944, or any later date, but they found as a fact that the duodenal ulcer did not remain aggravated on September 22, 1944. The Tribunal also decided that the claim had not been rejected by the Minister on the ground that the disease did not fulfil the condition specified in s. 1, sub-s. 1 (*b*) of the Act, namely, that it existed before or arose during war service and had been and remained aggravated thereby, and considered that the only question relevant to the continuance of the award of a pension was one of assessment, that was to say, whether the disablement persisted, and that any appeal against the Minister's decision that the disablement had passed away would lie to a Tribunal constituted for the purposes of s. 5 of the Act and not s. 1.

The Minister appealed.

Willink K.C. and *Lloyd-Jones* for the appellant Shipp.

C. L. Henderson K.C. and *H. L. Parker* for the Minister of Pensions.

Crispin for the respondent Pretty.

DENNING J. These two cases raise a question as to the true interpretation and application of the words of s. 1 of the Pensions Appeal Tribunals Act, 1943, and art. 4 of the Royal Warrant of December 4, 1943, with regard to cases where the disablement is due to disease which existed before or arose during war service "and has been and remains aggravated "thereby." A good deal of confusion seems to have arisen on the true interpretation of those words, particularly the words "and remains," and the case stated asks for a decision as to which of the various interpretations which are submitted are correct in law, or what other interpretation is correct. The aggravation of disease owing to war service may exist on a man's discharge from the army, but it may end before a claim is made, or after the claim is made but before the Minister gives his decision certifying or rejecting it. A literal interpretation of s. 1 of the Act and art. 4 of the Royal Warrant appears to indicate that aggravation must remain at the date of the Minister's decision; but that is an interpretation which I reject, because it cannot have been intended. It is a general principle that a man who makes a claim is not to be prejudiced by any delay of the adjudicating authority, and it is impossible to take the date of the Minister's decision as the material date. The suggestion has been made that it should be the date of the claim itself and that the aggravation must remain at that date, but there is no justification for that suggestion in the language of the Warrant. It would also produce injustice, because there is no reason why a man who may be delayed in making his claim should be deprived of his rights. The key to the right interpretation, in my view, is to be found in art. 2, sub-r. 3, of the Royal Warrant, which says that "any condition or requirement "laid down in this Our Warrant for an award, or the continuance of an award, shall, except where the context otherwise "requires, be construed as a continuing condition or requirement." It follows that the conditions or requirements in art. 4 are to be construed as continuing conditions or requirements, and "continuing" relates both to the past and to the present. Article 4 deals with what, no doubt, was considered to be the usual case, where the aggravation is in fact continuing at the time when the Minister gives his certificate. But, having regard to art. 2, sub-r. 3, I think it must be applied in a continuing sense by making it applicable, not only to existing disablement and existing aggravation, but also to past disablement and past aggravation. So, in my view, not only does it read, in relation to the present, as it stands, "Provided it is "certified that the disablement is due to a wound, injury or "disease which (i.) is attributable to war service; or (ii.) existed "before or arose during war service and has been and remains "aggravated thereby," but it also must be read, in relation to the past, in this way: "Provided it is certified that the disablement was due to a wound, injury or disease which (i.) was "attributable to war service; or (ii.) existed before or arose "during war service and had been and remained aggravated "thereby," that is, remained during the period of disablement.

I think the section must be read in the same way as the Warrant. It follows that not only existing disablement and aggravation can be dealt with by the Minister, and on appeal by the Tribunal, but also past disablement and past aggravation. The Minister cannot give a certificate as to future aggravation or future disablement, because it is not possible to deal in advance with that matter; but once a certificate of existing disablement and aggravation is given, an award can be made which will continue in the future. If the Minister should stop payment on the ground that aggravation has ceased, the man can make a fresh claim, saying that the aggravation remains, and, if it is rejected, he can appeal to the Tribunal.

So I find that it is possible on the wording of the Warrant and the Act for a certificate to be given in respect of a past period, as, for instance, where disablement is not claimed to be continuing, or where it is claimed to be continuing but found not to be so. The matter, of course, has to be dealt with in relation to the claim. Section 1 of the Act shows that the issue before the Minister is whether to grant or reject the claim, and the issue before the Tribunal is whether the claim was rightly rejected. If a man puts in his claim at the time of his discharge, as in Shipp's case, saying that he is disabled, and that his disablement is due to disease which existed before war service and has been and remains aggravated thereby at the date of his claim, which in his case was December 4, 1940, then that is the matter which the Minister has to certify or reject, or on appeal the Tribunal has to decide. In Shipp's case that was all the Minister or the Tribunal should have dealt with. If the claim had been made by him in June, 1944, for the first time, he would probably have made his claim then that the disease had been aggravated by war service, and remained at that date aggravated by war service. If that was the matter before the Minister and before the Tribunal, a decision could be given as to whether it remained aggravated at that date, and if it had ceased, the proper period could be assessed in respect of which the aggravation had continued.

In Pretty's case the Tribunal on September 22, 1944, determined that his disease had been aggravated by war service as on September 28, 1943, the date of his discharge from the army. They did not determine anything as to any period, and the Minister eventually refused to pay any pension after September 21, 1944, because he thought that the aggravation had passed away. The Tribunal had no jurisdiction to deal with the future, and they only dealt with the matter as at September 28, 1943. But when the Minister, as from September 22, 1944, declined to pay the pension on the ground that the aggravation had ceased, Pretty made a fresh claim, on which he could require the Minister to adjudicate, and on appeal he could go again to the Tribunal. In that way the Tribunal had jurisdiction to determine whether the aggravation continued after September 22, 1944.

It has been suggested in the course of argument that some of these appeals should be to a tribunal constituted under s. 5 of the Pensions Appeal Tribunals Act, 1943, when that section is brought into operation. But I would point out that there is a difference between the question of aggravation (which involves the question whether the aggravation is due to war service) and the question of disablement. Section 5 is only dealing with the question of disablement, which, as the definition in the Warrant shows, is really a medical matter; whereas aggravation by war service is not solely a medical matter, because it involves the question of causation. When the matter gives rise to any question whether a disease remains aggravated by war service, the appeal is properly to a Tribunal under s. 1 of the Act, and not under s. 5. I visualize that most cases arising under s. 5 would be cases where the man's disablement was not merely an aggravated disease, but a disease attributable to war service, and in such a case, when the question arose whether disablement had come to an end, it would be, not a question of causation due to war service, but a medical question, which would come under s. 5 of the Act.

In Pretty's case I hold that the Tribunal were wrong in point of law in holding that they had no jurisdiction to deal with Pretty's claim that from September 22, 1944, onwards his disease had been aggravated by war service. They had jurisdiction to deal with it, and I allow the appeal. In Shipp's case, having regard to the claim which was made by him in December, 1940, the only matter before the Minister and before the Tribunal was whether his bad eyesight was aggravated at that time by his war service, and the Tribunal in the circumstances ought not to have gone on to limit their award to a particular period. That was not before them. Indeed, it has been pointed out to me that Mr. Davenport, the surgeon who gave an opinion on behalf of Mr. Shipp, did not deal with the period at all: he only dealt with the question of aggravation by war service. It would be contrary to justice to limit the period, when Mr. Shipp had no notice that that point was to be considered and no opportunity of dealing with it. For this reason I think that the Tribunal exceeded its jurisdiction, and on that ground I allow the appeal.

Appeals allowed.

Solicitors for the appellant Shipp: *Ranger, Burton & Frost.*
Solicitor for the Minister of Pensions: *Treasury Solicitor.*
Solicitors for the respondent Pretty: *Culross & Co.*

H. A. P.

DELANEY *v.* T. P. SMITH LIMITED.

C. A.

1946
Mar. 14, 29.

Tucker and Cohen L.JJ. and Wynn-Parry J.

Trespass to land—Oral agreement for tenancy—No memorandum to satisfy statute—Clandestine entry into possession by tenant—Forcible ejectment by owner—Right of tenant to sue owner for damages—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.

The defendants were the owners of a dwelling-house which had been damaged by enemy action and which was being repaired. In April, 1944, the plaintiff entered into an oral agreement with the defendants' agent that he should become the tenant of the house at a weekly rent as soon as the repairs had been completed, which the county court judge found to be in December. The defendants subsequently decided to sell all the houses on the estate on which this house was situate, and so informed the plaintiff, who, however, made a clandestine entry into possession of the premises in December, 1944. About a week later the defendants forcibly ejected the plaintiff and his effects. The plaintiff thereupon brought an action against the defendants for trespass, alleging that he was tenant of the dwelling-house and as such protected by the Rent and Mortgage Interest (Restrictions) Acts. The defendants by their defence pleaded that there was no note or memorandum in reference to the alleged tenancy as required by s. 40 of the Law of Property Act, 1925. The county court judge found that there was no memorandum signed by the defendants' agent sufficient to satisfy the statute, and that there had been no part performance, but he held that the plaintiff was not seeking to enforce the agreement by action, as he had entered into possession of the premises. The defendants sought to justify their trespass by alleging that the agreement was not in writing, but their justification was defeated by proof of the agreement, and therefore the plaintiff was entitled to damages for the trespass. On appeal,

Held, allowing the appeal, that though the plaintiff's possession of the premises was sufficient to support an action of trespass against a wrongdoer, it was not sufficient to support it against the lawful owner of the premises. In the latter case it was an essential part of the plaintiff's cause of action that he had a possession in himself consistent with the freehold being in the defendants, and the onus of establishing this by proving a demise from the defendants to himself lay on the plaintiff. The plaintiff therefore had to rely on the oral agreement to support his action, and consequently his action was in substance an action brought upon that agreement and therefore failed.

Appeal from a decision of the judge of the Coventry county court.

The following statement of facts and the relevant passage from the county court judge's reserved judgment are taken substantially from Tucker L.J.'s judgment.

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The defendants were the owners of a dwelling-house No. 102 Allesley Old Road, Coventry. It had been damaged by enemy action and was being repaired in the year 1944. The plaintiff was anxious to obtain the tenancy thereof when repaired. In April, 1944, an oral agreement was made between the plaintiff and a Miss Kelly acting on behalf of the defendants that he should become tenant of this house at a rent of 24*s.* 6*d.* a week, the first two weeks to be paid in advance, and that he could go into occupation as soon as the house was ready. The repairs were thereafter effected and the house was ready for occupation by the second week in December, 1944. Before this, however, the defendants decided to sell all the houses on the estate on which 102 Allesley Old Road was situate, and they so informed the plaintiff by letter dated December 4, 1944.

The plaintiff subsequently had an interview with one of the directors of the defendant company at which he was informed that they adhered to their decision and could not let him a house. Thereafter the plaintiff managed to obtain a key of the premises and took possession on December 11. On December 20, the defendants forcibly ejected him and his effects, this being the trespass complained of. The plaintiff thereupon brought an action in the county court against the defendants for trespass. By his particulars of claim the plaintiff alleged that he was tenant of the dwelling-house in question and as such was protected in his occupation under the Rent and Mortgage Interest (Restrictions) Acts, 1920–1939, and claimed damages for trespass. In response to a request for further particulars he stated that he was unable to give the exact date on which the agreement to let was made, but that it was in the latter part of April, 1944. The defendants by their defence pleaded, inter alia, that there was no note or memorandum in reference to the alleged tenancy as required by s. 40 of the Law of Property Act, 1925 (1).

The county court judge in a reserved judgment held that there was no memorandum signed by the defendants' lawfully authorized agent sufficient to satisfy the statute, and that there had been no act of part performance, and dealt with the defen-

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(1) Law of Property Act, 1925, s. 40, sub-s. 1: "No action may be "brought upon any contract for "the sale or other disposition of "land or any interest in land, "unless the agreement upon which "such action is brought, or some "memorandum or note thereof is "in writing, and signed by the "party to be charged or by some "other person thereunto by him "lawfully authorized."

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dants' plea as follows: "The question then arises whether the "plaintiff brings this action upon the contract so that the action "is within the ambit of the statutory provision. He alleges a "tenancy, which is not quite the same thing as the agreement "for the tenancy, but which arose out of it, and therefore I "think that upon this part of his claim he seeks to charge the "defendants upon the agreement. But he also alleges that the "defendants unlawfully entered the house and ejected him "from it; and I think he is entitled to treat this as a separate "and independent claim. At the time that T. P. Smith (who, "I need hardly say, was acting as the agent of the defendants) "entered the house, the plaintiff was in possession of it. "Possession is prima facie lawful, and in this case it seems to me "that the plaintiff's possession was taken in pursuance of an "agreement by which the defendants were bound, not the less "because Smith had repudiated it. The plaintiff does not "need to enforce the agreement by action; he had already "enforced it by entry into possession; and, the agreement "being proved in the course of the trial of the plaintiff's claim "for trespass, it is the defendants who say that they were "entitled to eject the plaintiff because the agreement was not "in writing. If the defendants had brought an action against "the plaintiff for possession, they would have been met, and "defeated, by the plea that they had made an agreement with "the present plaintiff for a tenancy. In such an action, it "would have been no answer for them to say that the agreement was not in writing or evidenced by writing, because the "agreement would not be set up as a cause of action. I think "that the true position is this: the plaintiff, being in possession "of this house, is evicted by the defendants. He brings his "action in trespass. The defendants admit the eviction. They "have to justify it by showing that he was a trespasser. In "their attempt at justification, they are frustrated by proof of "the agreement. The plaintiff relies on the agreement, not as a "cause of action—his cause of action in trespass prima facie "is complete without it—but to defeat the plea that the "trespass was justified." The county court judge gave judgment for the plaintiff for *70l.* damages.

The defendants appealed.

A. P. Iliffe for the defendants. The decision of the county court judge in awarding damages to the plaintiff for trespass was wrong. In order to succeed in his action for trespass the plaintiff must show either that he had a legal interest in the premises, or that he had an equitable interest supported by a note or memorandum of an agreement signed by the defendants or by their agent so as to comply with s. 40 of the Law of Property Act, 1925, or that there had been some act of part performance. The plaintiff could not show that he had a legal interest in the premises. The county court judge has found that there was no note or memorandum sufficient to satisfy the statute and that there had not been part performance. The plaintiff was saying that he was lawfully on the premises, but he must show that he had a right to possession. When the plaintiff made a clandestine entry into possession of the premises he was a trespasser, and "a mere trespasser cannot by the very act of trespass "immediately and without acquiescence give himself what the "law understands by possession against the person whom he "ejects, and drive him to produce his title": per Lord Denman C.J. in *Browne* v. *Dawson* (1). Woodfall in his Law of Landlord and Tenant deals with two remedies for breach of contract. If the plaintiff's contention is correct there would be a third remedy which would be a better remedy than either.

W. L. James for the plaintiff. The judgment of the county court judge was correct. It is material to see where the onus of proof lay. It was sufficient for the plaintiff, in order to maintain an action for trespass, to show that he was in possession of the premises, and prima facie lawfully in possession. "The mere "apparent possession" of a person in de facto possession "gives "him all the remedies of a possessor as against strangers, and "therefore he can maintain trespass against everyone except "him who can show a present right to possession": see Winfield's Law of Tort (2nd ed.), p. 337. As soon as it was proved that the plaintiff was in possession of the premises it was necessary for the defendants to justify their trespass. [COHEN L.J. The defendants could say that they were freeholders and therefore entitled to possession.] The plaintiff's reply to that plea would be that there was in existence a valid agreement of tenancy which was good for all purposes except as regards s. 40 of the Law of Property Act, 1925. All that the plaintiff had to do was to prove that he was in possession. Section 40 of the Act of 1925 was intended to prevent action being brought upon an oral agreement for an interest in land. [COHEN L.J. You mean that the plaintiff could get by his own act what the law could not give him.] After the plaintiff was

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(1) (1840) 12 Ad. & El. 624, 629.

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in possession of the premises, however that possession was obtained, he was entitled to rely upon that possession. The defendants had wrongfully repudiated the agreement of tenancy, and a man cannot take advantage of his own wrong. If the defendants had brought an action against the plaintiff for possession, the plaintiff would have been entitled to rely on the oral agreement as a defence to that action notwithstanding s. 40. The plaintiff is not setting up the oral agreement as a cause of action, he is relying on his possession.

Iliffe replied.

Cur. adv. vult.

March 29. The following judgments were read.

TUCKER L.J. Cohen L.J. desires me to say that he has read the judgments which are about to be delivered and concurs in them.

[The learned lord justice then stated the facts and the relevant portions of the county court judge's judgment which are set out above, and continued :]

I think the learned judge came to an erroneous decision. It is clear that the plaintiff was in fact founding his claim on the tenancy agreement pleaded by him. It is no doubt true that a plaintiff in an action of trespass to land need only in the first instance allege possession. This is sufficient to support his action against a wrongdoer, but is not sufficient as against the lawful owner, and in an action against the freeholder the plaintiff must at some stage of the pleadings set up a title derived from the defendant. The true position is illustrated in the old forms of pleadings. See Bullen & Leake's Precedents, 3rd ed., pp. 802 and 803, and the cases there referred to dealing with the plea of " liberum tenementum." It is sufficient, I think, to refer to the judgment of Patteson J. in *Ryan* v. *Clark* (1), where he explained the nature of this plea as follows : " It admits such a possession as would maintain the action " against a wrong-doer, but asserts a freehold in the defendant " with a right to the immediate possession."

Mr. Sutton in " Personal Actions at Common Law," I think, correctly states the position at p. 185 where he explains that the plea of " liberum tenementum " might be thought to infringe the rule that a plea in confession and avoidance must either expressly or by necessary implication confess the plaintiff's claim, and says " but it was construed as admitting that the " plaintiff had possession of the close in question, which was " sufficient to support his action of trespass against a wrongdoer " but was not sufficient to support it against the lawful owner " of the property."

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(1) (1849) 14 Q. B. 65, 71.

This being the nature of the plea, where the plaintiff relied on a demise from the defendant, he had to plead it in his replication, and any defence thereto had to be set up by way of rejoinder: see *Wilkins* v. *Boutcher* (1). Considerable latitude is no doubt allowed with regard to pleadings in the county court, and it may appear at first sight that the technicalities of pleadings prior to the Common Law Procedure Act can have little bearing upon an appeal from a county court in the year 1946. None the less s. 40 of the Law of Property Act, 1925, deals with procedure. It must be pleaded and has been pleaded in the present case, and one way in which its efficacy can be tested is by examining precisely what has to be proved by a plaintiff in an action for trespass against the freeholder. I think the plaintiff was at some stage bound to rely on the oral agreement of tenancy. He has elected to do so in his particulars of claim, and in my view s. 40 of the Law of Property Act as pleaded is an answer to this claim. For these reasons I am of opinion that this appeal succeeds.

WYNN-PARRY J. The learned county court judge found that there was no sufficient memorandum of the agreement on which the plaintiff relied to satisfy s. 40 of the Law of Property Act, 1925, and that there was no evidence of any act of part performance such as would have taken the case out of s. 40 of the above Act; indeed, it was not argued before us with any force that the doctrine of part performance applied in this case. Notwithstanding, however, the absence of any memorandum in writing sufficient to satisfy the section, and the inapplicability of the doctrine of part performance, the judge has found in favour of the plaintiff. The material part of his judgment, which was a reserved judgment, has already been quoted by Tucker L.J., and I need not repeat it. I am unable to agree with the reasoning of the learned judge. In my view the plaintiff must rely on the agreement for the tenancy not merely " to defeat the plea that the trespass was justified," but as an essential part of his cause of action.

The reasoning of the judge raises a question of principle and, for the purpose of testing the matter, it is desirable to disregard any criticisms which might be levelled against the form of the particulars of claim. The alternative cause of action on which the judge held that the plaintiff was entitled to succeed was a claim in trespass to land. "In order to maintain an action for "this wrong the plaintiff must have a present possessory title. "Actual possession as owner is presumptive proof of property, "and is sufficient against a mere wrongdoer who cannot show "any better title or authority." See Bullen & Leake's Precedents, 3rd ed., p. 417 note, citing, among other cases, *Browne* v. *Dawson* (1).

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(1) (1842) 3 Man. & G. 807.

Under the old form of pleading the count, in such an action as this, would have taken some such form as: "That the "defendant broke and entered certain land of the plaintiff ". . . ." See Bullen & Leake's Precedents, 3rd ed., p. 415. Compare the count in *Browne* v. *Dawson* (1) which was "trespass for breaking and entering a certain room or apartment "of the plaintiff, called the school-room." To the above count the plea of the defendant would have been a plea of liberum tenementum, "That at the time of the alleged trespass the said "land was the freehold of the defendant." See Bullen & Leake's Precedents, 3rd ed., p. 802. The plea of liberum tenementum was construed as admitting the actual possession of the plaintiff, but as containing by implication an assertion of a right of possession in the defendant as owner of the freehold. By way of replication to a plea of liberum tenementum, the plaintiff might plead a demise from the defendant to the plaintiff. See Bullen & Leake's Precedents, 3rd ed., p. 803. Under the modern form of pleading a plaintiff, met with the defence that the land in question was the freehold of the defendant, can raise a corresponding plea of demise from the defendant by way of reply.

It is clear upon the facts in this case, as found by the judge, that if the pleadings had proceeded strictly (a hypothesis which must be assumed for the purpose of testing the matter), the plaintiff would have been compelled to plead the oral agreement for a tenancy by the appropriate proceeding analogous to a reply in the High Court, because he was not in a position to deny the defendant company's freehold title. Now it is to be observed that the plea of liberum tenementum, and the corresponding modern defence that the land was the freehold of the defendant, involve a confession and avoidance. The plea admits the possession of the plaintiff, but asserts a title to the freehold. If issue were joined at that stage of the pleadings, the defendant would have to assume the onus of proving his title. "In "trespass quare clausum fregit the possession of the plaintiff is "the foundation of the action; and the defendant is considered "sufficiently to deny the plaintiff's right of possession by pleading liberum tenementum in himself or a third person; in the "latter case justifying as the servant and acting by the command of such third person: and by this anomalous plea the "plaintiff is put to show how he has a possession in himself "consistent with the freehold being in another, unless he "chooses to traverse the title set up by the plea": *Roberts* v. *Tayler* per Cresswell J. (1), So where a plaintiff by his reply admits the title of the defendant but pleads a demise from him, there is a true confession and avoidance. The plaintiff is concluded by his confession and must fail in his action unless he proves the case set up by his reply, namely, a demise from the defendant. The onus is thrown upon him to prove the matter set up by way of avoidance, and it has become an essential part of his case to do so. Where, therefore, in such circumstances he relies on a demise or a tenancy, he must prove it, and in order to do so he must comply with s. 40 of the Law of Property Act, 1925, because as a result of the position into which he has been forced by the course which the pleadings have taken, he is, in my judgment, bringing an action on a contract for the disposition of an interest in land. It is as if he had amended his statement of claim: because, where the allegation in question goes to the root of the matter, he cannot by introducing the allegation into his reply place himself in a better position than he would have been in had he pleaded it in his statement of claim. The question then arises: Does a different result flow if, instead of admitting the defendant's title, the plaintiff by his reply denies the defendant's title, but as an alternative pleads a demise from him? In my judgment the result is the same. In such an event the plaintiff sets up an alternative case: in the event of his failing successfully to traverse the title of the defendant at the trial he is, to quote again the words of Cresswell J. in *Roberts* v. *Tayler* (1), "put to show how he has a "possession in himself consistent with the freehold being in "another." Thus, the proof of the demise or agreement for tenancy becomes, equally in such a case, an essential part of the plaintiff's case, without which he could not succeed. Assuming

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(1) 12 Ad. & El. 624.

(1) (1845) 1 C. B. 117, 126.

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that I am right in my conclusion that the plaintiff must satisfy s.40 of the above Act in a case where he admits the defendant's title, it would be strange if he could avoid that obligation by merely traversing the defendant's title in his reply.

In my judgment the true view is that the pleadings must be looked at as a whole; and if it appears that, in order to succeed upon a sole or alternative cause of action, he must prove a demise or an agreement for a tenancy, then he must satisfy s. 40 of the above Act or prove such part performance as will take the case out of the section. If this were not so, then it would follow that a person in the plaintiff's position, who has nothing more than an oral agreement to grant a tenancy, upon which, therefore, he cannot bring an action either for specific performance or damages, may, if he is able to effect a clandestine entry, on eviction successfully bring trespass; provided that he takes the precaution of not relying on the unenforceable agreement in his statement of claim, but relies on the allegation that the defendant "broke and entered premises of the plaintiff," an allegation which he must know to be unsupportable in law; confident that by so framing his pleadings he will be enabled to do by his reply that which he could not hope to do by his statement of claim, namely, to obtain relief against the defendant on the footing that a binding agreement of tenancy existed between them. So to hold would be in my view to defeat the section. For these reasons I would allow the appeal.

Appeal allowed.

Solicitors for defendants: *Griffith & Son, for John Varley, Coventry.*

Solicitors for plaintiff: *Julius White & Bywaters, for Penman, Johnson & Ewins, Coventry.*

R. F. S.

Approved. THRASYVOULOS IOANNON *v.* PAPA CHRISTOFOROS DEMETRIOU [1952] A.C. 84

LILLEY *v.* PETTIT.

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April 4, 12.

Lord Goddard C.J., Croom-Johnson and Lynskey JJ.

Evidence — Public document — Regimental records — Admissibility of, in evidence.

A document to be receivable in evidence as a public document at common law must be one prepared for the purpose of the public making use of it and with the object that all persons concerned in it may have access thereto.

The regimental records of a serving soldier, which are kept for the information of the Crown and the executive, and not for that of members of the public, who have no right of access to them, are not public documents within the meaning of the rule.

CASE STATED by the recorder of Cambridge.

The respondent, Adeline Beatrice Pettit, was convicted at a court of summary jurisdiction, sitting at Cambridge, of having made a false statement relating to a birth contrary to s. 4 of the Perjury Act, 1911, and was sentenced to pay a fine of 5*l*. She appealed to quarter sessions and, on the hearing of the appeal, the following facts were proved: the respondent was the wife of Clarence Leslie Pettit who joined the Cambridgeshire Territorial regiment in 1939 and was called up for service in September of that year. The respondent had been married in 1939 but had had no child up to November, 1941, when her husband went abroad. He was subsequently made a prisoner of war at Singapore. On May 15, 1944, the respondent registered the birth of a child as having been born on May 1, 1944, stating that her husband was the father and such statement formed the basis of the charge made against her. Alfred John Harris, a civilian staff officer at the War Office, was called as a witness and said that he was in charge of the regimental records relating to the respondent's husband. He stated that the records were official records kept by a government department and preserved at the regimental record office and that they were not documents to which the public had access. It was objected on behalf of the respondent that the records were inadmissible in evidence. The appellant further desired to adduce in evidence a photostatic copy of a cable received from the Red Cross at Geneva, to the admission of which objection was also taken. The recorder ruled that both the regimental record and the cable were inadmissible in evidence and, being of opinion, that the admissible evidence tendered did not displace the presumption of the legitimacy of the child, allowed the appeal.

The appellant appealed.

Horner for the appellant. The recorder was wrong in holding that a regimental record, which is kept in accordance with the requirements of the Army Act and the King's Regulations, was not admissible in evidence as a public document. In *The Irish Society* v. *The Bishop of Derry* (1), the leading case on the

(1) (1846) 12 Cl. & F. 641, 668.

subject of public documents, Parke B. said: "In public documents, made for the information of the Crown, or all the King's "subjects who may require the information they contain, the "entry by a public officer is deemed to be true when it is made, "and is for that reason receivable in all cases, whether the "officer or his successor may be concerned in such cases or not." The decision in that case has often been referred to, but never doubted. In the present case the regimental records were made for the information of the Crown so that questions of the man's right to pay and pension might be determined and the documents are available to all the King's subjects who may need the information they contain. The statement of the rule by Parke B. in *The Irish Society* v. *The Bishop of Derry* (1) was cited with approval in *In re Stollery, Weir* v. *Treasury Solicitor* (2). In Taylor on Evidence, 12th ed., para. 1592, p. 1002, it is said that "To render any document admissible in "evidence as an official register, it must be one which the law "requires to be kept for the public benefit" and in support of that statement reference is made to *Gleen* v. *Gleen* (3) where an army medical sheet, kept under the Royal Army Medical Service Rules, was admitted in evidence.

Seaton for the respondent. The record was rightly excluded from being given in evidence. The question is covered by s. 1 of the Evidence Act, 1845, which facilitates the admission in evidence of certain official and other documents, but contemplates that there must be a section of an Act of Parliament relating to them. There is no statute which makes the particular document in the present case admissible. The Evidence Act, 1851, s. 14, deals with the case of public documents, and the question in the present case is whether the document sought to be given in evidence came within that category. In *Sturla* v. *Freccia* (4), Lord Blackburn said that a public document means a document made for the purpose of the public making use of it—especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be, that the public, all persons concerned in it, may have access to it. Regimental records are kept in the interests of the serving members of a regiment, but no one without authority may go and look at them, in which respect they differ entirely from a register of births or marriages, to which members of the public have access. The reason why the law is careful regarding

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(1) 12 Cl. & F. 641, 668.

(2) [1926] Ch. 284.

(3) (1900) 17 T. L. R. 62.

(4) (1880) 5 App. Cas. 643.

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the admissibility in evidence of documents of the class with which the present case is concerned is to guard against the admission of hearsay evidence. This particularly applies in the case of regimental records which, especially in war-time, must necessarily be compiled largely from hearsay.

Cur. adv. vult.

April 12. The following judgments were delivered.

Lord Goddard C.J. This is a special case stated by the recorder of Cambridge who allowed an appeal, and quashed the conviction of the respondent by the court of summary jurisdiction sitting at Cambridge, for having on May 15, 1944, made a false statement relating to a birth contrary to the Perjury Act, 1911, s. 4.

Quite shortly the facts were that the respondent in registering the birth of a child gave her husband's name as the father, and it was alleged by the prosecution that her husband had been called up for service at the beginning of the war and they tried to prove that when the child was conceived he was overseas. The child was born on May 1, 1944, and in order to prove the date when the husband went overseas a civilian staff officer at the War Office, who stated that he had charge of the records relating to the respondent's husband, was called as a witness. He stated that these records were official records and documents kept by a government department and preserved at the regimental records office; that they were not documents to which the public have access, nor were they kept for the use or information of the public. The recorder held that the records were not admissible under the common law. It was conceded, at least before this court, that the documents were not admissible under s. 163 of the Army Act as the charge was not one under that Act. Nor could the Evidence Act of 1938 make the documents admissible as that Act has no application to a criminal charge. Another document which the prosecution sought to prove was rejected by the recorder and it was not contended before us that it was admissible. There was no other evidence from which any conclusion could be drawn as to where and when the respondent's husband was serving during any relevant time and there being no evidence, therefore, to show impossibility of access, the recorder found that the case was not proved and allowed the appeal.

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The only question now before this court is whether the recorder was right in refusing to admit the regimental records. The contention of the appellant is that they are public documents and therefore admissible as prima facie evidence of the facts stated therein at common law, and the first thing, therefore, is to see how these documents come into existence. The King's Regulations for the army provide for the keeping of records of a soldier's services and his military history and they contain elaborate and minute provisions as to what is to be recorded. Among other things that should certainly appear is the period of his service abroad. By reg. 1711 it is provided that service abroad is reckoned from the date of embarkation in the United Kingdom to the date of disembarkation on return, both dates inclusive, so, if the record is admissible, no simpler or more convenient method of proving the period during which a particular soldier has been beyond the seas can be imagined. But because a method of proof may be convenient, it is not necessarily permissible, and these records, though produced from proper custody, can be used to prove the facts recorded, only if they come within settled rules of law relating to evidence. Now it is a well settled rule that public documents are admissible as prima facie evidence of the facts stated in them and the question that we have to determine is whether these regimental records are public documents within the meaning of the rule. The King's Regulations are not statutory but are made by His Majesty in virtue of his prerogative as the head of the army. They form part of the code by which persons subject to military law are bound and it is the duty of the officer in charge of the records to see that they are properly kept. No doubt it is his duty to satisfy himself, so far as he can, by such means as are available to him, that what he records is true; but because a document is an official document it by no means follows that it is a public document, within the meaning of the rule. The locus classicus on the subject is *The Irish Society* v. *The Bishop of Derry* (1). The question in that case material for consideration in the present, was whether certain writs issued from the Court of Exchequer in Ireland to the Bishops of Derry to ascertain the value of the firstfruits and twentieths, and the returns to the writs made by the bishops, were admissible. Parke B. in delivering the opinion of the judges in that case said: "The writs related to a public matter, the revenue of the Crown, "and the Bishops, in making the return, discharged a public

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(1) 12 Cl. & F. 641, 668.

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" duty, and faith is given that they would perform their duty " correctly: the return is therefore admissible, on the same " principle on which other public documents are received." And later on he said: " In public documents, made for the " information of the Crown, or all the King's subjects who may " require the information they contain, the entry by a public " officer is presumed to be true when it is made, and is for that " reason receivable in all cases, whether the officer or his " successor may be concerned in such cases or not." In my opinion it is quite clear that the learned Baron did not mean to lay down that every document that may be prepared by a servant of the Crown for the information of His Majesty is a public document. It may be that the words " for the information of the Crown, or all the King's subjects who may " require the information they contain " should be read as meaning " for the information of the Crown, that is to say, all " the King's subjects who may require the information they " contain." But, however that may be, he was there dealing with documents of record in the courts. Many documents are prepared for the information of the Crown, that is the executive, which are of a highly confidential nature and it is well known, and has recently been held by the House of Lords, that the Crown has an absolute right to object to produce any document on the ground that it would be against the public interest so to do: (*Duncan* v. *Cammell, Laird & Co.* (1).) It is difficult, therefore, to see how a document to which the public can have no access and which the Crown can refuse to produce under a subpoena could by any possibility be described as a public document.

The next case to which reference may be made on this subject is *Sturla* v. *Freccia* (2), in which Lord Blackburn considered *The Irish Society* v. *The Bishop of Derry* (3) and dealt in some detail with what can be described as a public document. The case was concerned with a report of a committee appointed by a public department in a foreign state and acted on by the government of that state, but the House held it was not admissible as a public document. Lord Blackburn, after quoting Parke B.'s judgment, went on to say: " Now, my Lords, " taking that decision, the principle upon which it goes is, that " it should be a public inquiry, a public document, and made by " a public officer. I do not think that ' public ' there is to be

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(1) [1942] A. C. 624.
(2) 5 App. Cas. 623, 643.
(3) 12 Cl. & F. 641.

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"taken in the sense of meaning the whole world . . . . But "it must be a public document, and it must be made by a "public officer. I understand a public document there to "mean a document that is made *for the purpose of the public "making use of it, and being able to refer to it.* It is meant to be "where there is a judicial, or quasi-judicial, duty to inquire, as "might be said to be the case with the bishop acting under "the writs issued by the Crown. That may be said to be "quasi-judicial. He is acting for the public when that is done; "but I think the very object of it must be that it should be "made *for the purpose of being kept public, so that the persons "concerned with it may have access to it afterwards.*" (The italics are mine.) Later, in the judgment, he referred to the case of *Arnold* v. *The Bishop of Bath and Wells* (1), and said: "Supposing . . . . the entry had been made by the bishop on "his visitation that such and such a man was the clergyman "of the parish, and had been admitted some twenty years "before, secundum consuetudinem, and suppose it was wrong "to admit him, that falls completely within the principle which "I think the case of *The Irish Society* v. *The Bishop of Derry* (2) "establishes. It seems to me that it is clearly within that "principle. The bishop made his visitation, and recorded it "*with the wish and intent that it should be kept publicly as a "register, to be seen by everybody in his diocese.* If the bishop "had not the right to make such an inquiry, so as to make it "evidence in future, that is another affair; but if he had, then "he was a public officer performing what he thought a public "duty, *with the view and intent that it should be public.*" (Again, the italics are mine.) It seems to me clear from the noble and learned lord's speech that to be a public document it must be one made for the purpose of the public making use of it. Its object must be that all persons concerned in it may have access to it.

Here it appears to be beyond controversy, and indeed, it was found as a fact, that the public has no right of access to these records. They are records which, in my opinion, an officer of the Crown could refuse to produce on a subpoena if it was considered contrary to the public interest so to do. If a document is a public document it must be so equally in time of war as in time of peace and it is obvious that it might be most detrimental to the public interest to allow, in time of war, persons to have access to these records as they would show the

(1) (1829) 5 Bing. 316. (2) 12 Cl. & F. 641.

movement of troops. The very fact that no defence regulation was passed prohibiting access to these records tends to show that they are not public, otherwise it is impossible to suppose that precautions would not have been taken to prevent or restrict access to them. And again, the fact that by s. 163, of the Army Act, 1881, special provision is made which would in my opinion, include these records or some of them in proceedings under the Act whether before a civil court or a court martial, also indicates that these are not public documents, for if they were there would have been no necessity to provide specially that they should be admissible. The only case in which it seems any part of a soldier's record has ever been accepted by a court is that of *Gleen* v. *Gleen* (1), where Sir Francis Jeune P., appears to have admitted the medical sheet of a soldier to prove that he was suffering from a disease so as to establish adultery. That was an undefended case so the question was not argued and the report is very meagre, but in my opinion that case ought not to be followed if the learned President admitted the sheet as a public document. The provisions which have since been made by the Evidence Act, 1938, and the divorce rules, may have the effect of admitting these documents in matrimonial causes but these rules have no application to the present case, and I express no opinion regarding them in the present case which is of a criminal nature.

In my opinion these records are not within the class that can be described as public documents. They are not kept for the information of the public but for the information of the Crown and the executive, and accordingly, in my opinion, the recorder was right in refusing to admit them as evidence. It follows that this appeal must be dismissed with costs.

CROOM-JOHNSON J. I agree. I had prepared a judgment, but after I had read that of the Lord Chief Justice which has just been delivered and with which I agree, I could see no necessity for delivering my own.

There are, however, one or two further points to which I desire to call attention. No record or document seemingly was ever tendered to the learned recorder. What happened was that a civilian staff officer at the War Office was called and he stated that he was in charge of the records relating to the respondent's husband, presumably relating to his army service.

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(1) 17 T. L. R. 62.

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He added that " these records were official records or documents " kept by a government department and preserved at the " regimental record office but that they were not documents to " which the public have access or kept for the use or information of the public." At this point there was an objection that these unspecified documents were inadmissible and without more evidence by the prosecution, after argument, the objection was upheld. I can, therefore, only guess at the nature of the record or document which the prosecution were proposing to put in to show prima facie that the husband was taken a prisoner of war at Singapore and was detained by the enemy as such at all material times in order to prove non-access. I can only surmise that it was a record of service form or paper, that being, I suppose, something with which most of us are now familiar. If that had been tendered it may be that a distinction might have been sought to be drawn between records or registers as a class and other official documents coming from official custody. Such a distinction may exist—see Taylor on Evidence, 12th ed., para. 1479, p. 943 ; paras. 1591 and 1592, p. 1002 ; Phipson on Evidence, 7th ed., p. 328 and, seemingly, indicated in Lord Blackburn's speech in *Sturla* v. *Freccia* (1).

A register is evidence of the particular transaction which it was the officer's duty to record even though he has no knowledge of its occurrence : (*Doe* v. *Andrews* (2).) It may be that that may be a reason for the distinction, if it exists, between registers and such public documents as are of a judicial or quasi-judicial nature. It is not necessary, however, to pursue that inquiry further. It would have had to be shown that the person who keeps the register is under a public duty either by statute or by the nature of his office to make such entries after satisfying himself of their truth and that the entries were made for the benefit or information of the public—(see Taylor, para. 1592 and Phipson, p. 328)—where the authorities are collected, and cp. 1 Starkie, 3rd ed., at pp. 230 and 243. In view of the admission by the officer to which I have called attention and the state in which the evidence was left it is difficult to see how these two conditions were satisfied in this case.

On the second of these points reference may be made to the case of *Heyne and Others* v. *Fischel & Co.* (3), where the question of the admissibility of a public register or record was con-

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(1) 5 App. Cas. 623, 644.

(2) (1850) 15 Q. B. 756.

(3) (1913) 30 T. L. R. 190.

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sidered. That was an action brought to recover damages for breach of contract, an action in which the general post office was not concerned. It was sought to put in certain records kept by the post office showing the times of the receipt and delivery of telegrams. Pickford J. who tried the case rejected the evidence. In the course of his judgment he dealt with the matter as follows :—" For the plaintiffs it was contended that " these documents were public records, but looking at the " definition of public documents in the cases he did not think it " was wide enough to cover these—*Mercer* v. *Denne* (1). *Sturla* " v. *Freccia* (2). These documents were not meant to be pre-" served for more than a short time ; they were not documents " to which the public had access ; they were not the result " of a public inquiry, and they did not deal with a general " public right. They were merely documents enabling the " post office to regulate the pay of its servants and to see how " the telegraph boys were doing their work." I agree with that reasoning.

I cannot help expressing my regret that the precise nature of the paper which it was proposed to adduce, called in the case indifferently " documents," " records," or both, was not plainly stated, so that it could have been specifically described or identified in the case. Whatever it was, however, I am satisfied that it was not shown to be admissible in this case either as a public document or as a public register or record.

LYNSKEY J. I agree with the judgment of Lord Goddard C.J. and with the reasoning on which it is based.

Appeal dismissed.

Solicitor for the appellant : *The Director of Public Prosecutions.*

Solicitors for the respondent : *Speechly, Mumford & Craig, for John Hepworth, Cambridge.*

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(1) [1905] 2 Ch. 538.

(2) 5 App. Cas. 623, 644.

P. B. D.

BROWN *v.* WOLFINDEN.

1946
Apr. 9.

Lord Goddard C.J., Croom-Johnson and Lynskey JJ.

Food and drugs—Sampling—Milk obtained from dairy outside area where sold—Request to procure samples at dairy—Samples taken while milk in transit—Proceedings taken in area where milk sold—No jurisdiction—Food & Drugs Act, 1938 (1 & 2 *Geo.* 6, *c.* 56), *s.* 24, *s.* 68, *sub-s.* 5, *s.* 80, *sub-s.* 2.

A farmer, carrying on business in the county of B., consigned milk for sale in the county of S. In pursuance of a request made in accordance with s. 68, sub-s. 5, of the Food & Drugs Act, 1938, by the county inspector for S. to the chief inspector for B., to procure samples of the farmer's milk at his farm, two officials of the county of B. attended at the farm and saw two churns of the farmer's milk collected by a lorry. The sampling officer met the lorry about three-quarters of a mile away and took samples. On analysis one of the samples showed that the milk contained added water. In purported exercise of the option given by s. 80, sub-s. 2, of the Act, proceedings were taken against the farmer before justices for the county of S. and the farmer was convicted :—

Held, that the samples, having been taken in transit and not at the farm as requested by the county inspector for S., had not been procured in accordance with s. 68, sub-s. 5, of the Act and that the S. justices therefore had no jurisdiction to hear the information.

Case stated by Surrey justices.

The appellant, a farmer, was charged before a court of summary jurisdiction sitting at Richmond, Surrey, on April 12, 1945, with unlawfully offering for sale for human consumption on January 27, 1945, at Long Crendon, Buckinghamshire, milk to which an addition of water had been made, contrary to s. 24 of the Food & Drugs Act, 1938.

The following facts were proved or admitted. The respondent was the county inspector for Surrey. The appellant was a farmer and milk producer carrying on business at Long Crendon, Buckinghamshire. The appellant's milk was sold to the Milk Marketing Board under a contract in the prescribed form dated September 12, 1942. On January 27, 1945, while under the observation of two officials of the Buckinghamshire County Council, the appellant brought two churns of milk on a float and put them down at the regular collection point outside the gate of his farm. The observers saw the churns collected by a lorry. The sampling officer met the lorry about three-quarters of a mile away and took samples from each churn. The churns were labelled showing that the milk was being consigned by the appellant to a firm at Richmond, Surrey. The sampling officer divided the samples into three parts and sent one part of each by post to the appellant and one part to the public analyst. The sampling officer had taken the samples in pursuance of a request contained in a letter dated January 23, 1945, from the respondent addressed to the Chief Inspector, Buckinghamshire County Council, in which the respondent said: "With further "reference to my letter dated 30 November, 1944, requesting "you to procure samples of milk from Bernard Brown of Bigmarsh Farm, Long Crendon, Bucks., I have to inform you "that I have received information that further consignments of "Mr. Brown's milk delivered to Messrs. Hornby & Clarke, Ld., "at Princes Road, Richmond, have contained added water. "I therefore have to request you to procure samples of "Mr. Brown's milk at Bigmarsh Farm at your earliest "opportunity." On analysis it was found that one sample was deficient of milk solids other than milk fat, the deficiency corresponding to the presence of five per cent. of added water, and that its freezing point confirmed the presence of at least three per cent. of water.

It was contended for the appellant, inter alia, that the Richmond justices had no jurisdiction to hear the information.

The justices were of opinion that they had jurisdiction in accordance with s. 68, sub-s. 5, and s. 80, sub-s. 2, of the Food & Drugs Act, 1938 (1), and they convicted the appellant and fined him 15*l.* with 10*l.* 10*s.* costs.

The appellant appealed.

Bernstein for the appellant.
Heathcote-Williams for the respondent.

LORD GODDARD C.J. The first point taken is one of juris-

(1) Food & Drugs Act, 1938, s. 68, sub-s. 5: "Where milk "sold or exposed for sale within "the area of any council is obtained from a dairy situate outside that area, the medical "officer of health or any other "authorised officer of the council "may by notice in writing to the "medical officer of health or other "authorised officer of a Food "and Drugs authority within "whose area the dairy is situate, "or through whose area the milk "passes in transit, request him to "procure samples of the milk at "that dairy, or while it is in transit, "and it shall be the duty of an "officer who receives such a notice "to procure . . . . samples of the "milk in question and to forward "those samples to the officer who "gave the notice . . . . and, for "the purposes of this Act, samples "so procured shall be deemed to "have been procured within the

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diction. It is said that the Surrey justices had no jurisdiction to hear and determine the matter, and it could not be contended otherwise if it were not for a provision of the statute giving them such jurisdiction, because the offence, if any, was committed in Buckinghamshire, but there is a provision in s. 68, sub-s. 5, of the Food & Drugs Act, 1938, which it is contended gives them jurisdiction. The prosecutor purported to exercise the option given him by s. 80, sub-s. 2, of the Act to proceed against the Buckinghamshire farmer before the Surrey justices at Richmond, and it was therefore necessary for him to prove that the sample had been procured in accordance with sub-s. 5 of s. 68. It appears that in the request by the county inspector for Surrey directed to the county inspector for Buckinghamshire, after having stated that there was reason to believe that samples of milk from this farm contained added water, he said: "I therefore have to request you to procure samples of "Mr. Brown's milk at Bigmarsh Farm at your earliest opportunity." That was a request to obtain a sample at the dairy. The Buckinghamshire officer did not comply with that request, but procured a sample of the milk while it was in transit, which he was not asked to do.

The point is not one that has any merits in it, nor is it necessary to deal with any of the other points which Mr. Bernstein has outlined, some of which might raise very difficult questions of law, because this case fails in limine. When once it appeared that the request to the Buckinghamshire officer had not been properly complied with, there was no jurisdiction in the Surrey justices to hear the case at all. Therefore they ought to have declined jurisdiction and dismissed the information. This appeal must be allowed with costs.

CROOM-JOHNSON J. I agree for the same reasons.

"area for which the last-"mentioned officer acts."

Section 80, sub-s. 2: "Subject "as hereinafter provided, where a "sample has been procured under "this Act, any proceedings in "respect of the article sampled "shall be taken before a court "having jurisdiction in the place "where the sample was procured: "Provided that—(*a*) where a "sample procured within one area "is for the purposes of this Act "deemed to have been procured "within another area, proceedings "may, at the option of the prose-"cutor, be taken either before a "court having jurisdiction within "the area within which the sample "was procured, or before a court "having jurisdiction within the "area within which it is deemed to "have been procured."

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LYNSKEY J. I agree.

Appeal allowed.

Solicitor for appellant: *Cecil Bartram, Oxford.*

Solicitor for respondent: *Dudley Aukland, Clerk to Surrey County Council.*

H. A. P.

1946
May 1.

Lord Goddard C.J., Humphreys and Singleton JJ.

FLATMAN *v.* LIGHT AND OTHERS.

Justices—Criminal law—Respondents charged within Metropolitan police area with being in possession of goods " reasonably suspected of being " stolen "—Goods identified as stolen in another county—No evidence offered on unlawful possession charge—Respondents discharged—Re-arrest and charge in other county of larceny—Information dismissed—Autrefois acquit.

The respondents were charged at a court of summary jurisdiction at Chingford, on remand from another Essex court, under s. 24 of the Metropolitan Police Courts Act, 1839, with having in their possession a number of fowls which were reasonably suspected of having been stolen or unlawfully obtained. Certain of the fowls had, however, been identified as having been stolen from a fowlhouse at Wimblington in the Isle of Ely and therefore the Essex police offered no evidence on the unlawful possession charge and the respondents were discharged, but were immediately re-arrested by the Isle of Ely police and later charged before the justices at March police court with larceny. The respondents at first pleaded guilty but later withdrew that plea, and the justices, being of opinion " that the respondents had already been charged with and " discharged for offences arising in connexion with the same act," dismissed the informations. On appeal:—

Held, that it was no answer to a charge of larceny to say that the accused person had already been acquitted of a charge of unlawful possession, which was a quite different offence.

CASE STATED by Isle of Ely justices.

At a court of summary jurisdiction sitting at March in the Isle of Ely informations were preferred by James Frederick Flatman, an inspector of police, under s. 2 of the Larceny Act, 1916, against three men named Light and another man named Burlingham, for that they jointly with one another between October 2 and 3, 1945, at the parish of Wimblington, did feloniously steal twenty-five Rhode Island Red pullets and cockerels and one Indian game cockerel of the total value of

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21*l.* 15*s.* 0*d.*, the property of William Guy Ruston. The informations were heard by the justices on October 17, 1945, and were dismissed.

The facts were as follows: On the night of October 2–3, the locked fowl house of Mr. Ruston was broken into and fowls stolen. Later the same night the four defendants, who were driving in a motor car, were stopped at Epping, Essex, by the police, but drove off. They were later stopped again at Waltham, by an officer of the Metropolitan police and taken to Waltham Abbey police station. In a crate attached to the back of the car were found twenty birds and in a space between the rear seat and the back of the car another thirty-five birds, of which sixteen were dead, apparently from suffocation. On the same day the defendants were brought before a court of summary jurisdiction at Waltham Cross and charged, under s. 24 of the Metropolitan Police Courts Act, 1839, 2 & 3 Vict., c. 71 (1), inter alia, with having in their possession goods reasonably suspected of having been stolen or unlawfully obtained. They were remanded until October 9, when they were brought before justices at Chingford. Meanwhile certain of the fowls taken from the defendants' car had been identified as those stolen from Mr. Ruston's fowl house, and accordingly no evidence was offered by the police on the charge of unlawful possession and the defendants were discharged, but they were immediately arrested by an officer of the Isle of Ely police on a charge of larceny. On their being brought before the justices at March all four of the defendants elected to be dealt with summarily and pleaded guilty, but subsequently a solicitor appearing for the three Lights applied for leave to withdraw their pleas of guilty. This application was granted and leave was also given to Burlingham to withdraw his plea of guilty. At the subse-

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(1) Metropolitan Police Courts Act, 1839, section 24: ". . . every person who shall "be brought before any of the said "Magistrates charged with having "in his possession or conveying in "any manner any thing which "may be reasonably suspected of "being stolen or unlawfully "obtained, and who shall not give "an account to the satisfaction of "such Magistrate how he came by "the same, shall be deemed guilty "of a misdemeanor, and shall be "liable to a penalty of not more "than five pounds, or, in the dis"cretion of the Magistrate, may be "imprisoned in any gaol or house "of correction within the Metro"politan Police District, with or "without hard labour, for any "time not exceeding two calendar "months."

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quent hearing the justices, being of opinion that the respondents, having already at Chingford "been charged with and "discharged of offences arising in connexion with the same "acts," could not be charged again, and therefore should be acquitted, dismissed the informations.

The police officer appealed.

Linton Thorp K.C. and *Neil Lawson* for the appellant. The respondents having pleaded not guilty and allowed the evidence for the prosecution to be concluded it was then too late to raise the defence of autrefois acquit: see *Rex* v. *Banks* (1). In this case it is not really a question of autrefois acquit but the application of the principle that a man cannot be put in peril twice for the same offence. In fact the respondents never were put in peril twice for the same offence. They were charged in Essex with the offence of unlawful possession under the Metropolitan Police Courts Act, 1839, s. 24, which enables proceedings to be taken against a person having in his possession goods reasonably suspected to have been unlawfully obtained but where they can not be proved to have been stolen. That is a statutory misdemeanor, and larceny is a felony. The Essex justices had no jurisdiction to try a charge of larceny.

[HUMPHREYS J. The question here is whether the respondents had been charged at Chingford with larceny or any offence which consisted of the same elements as a charge of larceny.]

Yes, and it is submitted that these men never were in peril of any such charge. [Reference was also made to *Haynes* v. *Davis* (2).]

Pensotti for the respondents. It is a misnomer to say that the plea here was one of autrefois acquit. The test in these cases is to be found in the judgment of Pollock B. in *Reg.* v. *Miles* (3), where he cited Cockburn C.J. in *Reg.* v. *Elrington* (4) as follows: "We must bear in mind the well-established "principle of our criminal law that a series of charges shall not "be preferred, and whether a party accused of a minor offence "is acquitted or convicted he shall not be charged again on "the same facts in a more aggravated form."

[LORD GODDARD C.J. In this case these men have been acquitted of a statutory misdemeanor and now are being charged with a felony. Do you say that larceny is unlawful possession in an aggravated form?]

(1) [1911] 2 K. B. 1095, 1101.
(2) [1915] 1 K. B. 332, 338.
(3) (1890) 24 Q. B. D. 423, 436.
(4) (1861) 1 B. & S. 688.

If a man is found in unlawful possession of goods he can afterwards be charged with larceny. On the evidence in their possession the police can elect either to charge him with larceny or with some other offence which they suspect. Larceny is merely an aggravated form of unlawful possession and the justices, if they had no jurisdiction to try a charge of larceny should have stood over the charge of unlawful possession. The acts in respect of which the respondents were acquitted were the same as those to which the indictment for larceny referred, and the decision of the justices was right.

LORD GODDARD C.J. This is a case stated by the justices of the Isle of Ely who, on a charge preferred against the respondents of larceny of fowls, discharged them on the ground that they had been already charged with and discharged of offences arising in connexion with the same acts. They accordingly held that they could not be charged again with the larceny which was the subject of the information before the court.

[His Lordship stated the facts and continued :] The original charge was preferred against them at Waltham Cross within the Metropolitan police district under s. 24 of the Metropolitan Police Courts Act, 1839. That is a section applicable in the Metropolis, and there are similar sections operative in some of the large cities of England, certainly in Liverpool, to provide for this class of case. A man is found in very suspicious circumstances in possession of property. He can be called upon to give an account of how he got it. If the police, or whoever started the prosecution, were satisfied that it was stolen and could show it was stolen, there would be no need for this section. It is designed to cover cases where it is impossible to show at the time of the man's arrest that the property is stolen. It is not necessary to show that it is stolen, because the section deals with property which is " reasonably suspected of being stolen " or unlawfully obtained." If that is so, a man can be brought before the magistrates and dealt with under this section.

These fowls, it turned out, were in fact stolen, and during the time for which the respondents were put on remand, between October 4 and 9, the Essex police received information, which I suppose came down from the Isle of Ely. When the case came before the justices on remand at Chingford the police officer in attendance gave information as to the proposed charge of stealing the goods and thereupon the justices dismissed the charge of unlawful possession as it was not necessary to proceed with it. The respondents were then arrested and brought before the justices of the Isle of Ely. They seem, according to the case, to have made a full confession that they had stolen these fowls. When they were brought before the justices they pleaded guilty. Then a solicitor, who I think one may say must have considerable powers of advocacy in that court, arrived, and he not only persuaded the justices to allow the plea of guilty to be withdrawn and a plea of not guilty to be entered, but he also persuaded them that he had a good defence to this charge under the doctrine of autrefois acquit and that they could not convict these men of larceny because they had already been acquitted of the same offence at Chingford.

Two points are taken by Mr. Linton Thorp. I mention the first because he took it and cited an authority, but it is only necessary to deal with it in a very brief manner. He said the plea of autrefois acquit was not available to the defendants because they had pleaded not guilty, and the case had proceeded on that footing. In support of that he cited *Rex* v. *Banks* (1), which was a decision of the Court of Criminal Appeal, and which does decide, no doubt, that a double plea is not allowed in a criminal case. But one just has to see what the court said there. It was that "according to well-established rules of criminal "pleading, a defendant, having pleaded not guilty to an "indictment, is not entitled, while that plea is standing, to "have a plea of autrefois acquit put upon the record." In that case the court was dealing with an extremely technical objection which had been raised. A prisoner had expressed his intention through counsel of pleading guilty to an indictment of manslaughter, there being at the same time a coroner's inquisition against the prisoner for murder. A plea of not guilty was accepted by the prosecution on the coroner's inquisition, on which, of course, he could have been convicted of manslaughter. Then when he was arraigned on the charge of manslaughter he attempted to plead autrefois acquit although he had pleaded not guilty, and he had never obtained leave to withdraw his plea of not guilty. I think the only thing that the court decided was that, so long as the plea of not guilty stood, the plea of autrefois acquit could not be dealt with, but they nowhere said the court could not give leave to withdraw the plea of not guilty. They said, first of all the plea of autrefois acquit must be heard and then, if that plea had been decided adversely to the prisoner, it being a charge of felony,

(1) [1911] 2 K. B. 1095.

the prisoner could have pleaded over. If judgment had been given he would have been allowed to plead over and plead not guilty. Nowadays it would be seldom that any technical point of that sort would be allowed to prevail, except in such a case as *Banks'* case, where a very technical point was taken by the defendant and answered equally technically by the prosecution. In common justice and fairness, if during the course of a case it turned out that a man had been previously convicted or acquitted of the same offence with which he was then charged, the court would, of course, allow him to plead it and would give effect to that plea. When a case is before justices I doubt very much whether it is right to say that a plea that a man has been already acquitted or convicted of a previous offence is in any strictness a plea of autrefois acquit or autrefois convict, because those pleas are pleas which have to be pleaded formally, because they form part of the record of the court. They ought to be pleaded in writing and then a replication is pleaded by the prosecution. When a case is being dealt with by a court of summary jurisdiction I think it is true to say that what the court must do is to give effect to the maxim Nemo debet bis vexari pro una et eadem causa. I do not think it is technically autrefois acquit, but that does not matter.

In this case we do not decide the case on any such ground that the plea of not guilty was standing, because it is obvious that if the justices could properly find that these men had been already acquitted of the offence or convicted of the offence they should have given effect to it at any stage of the proceedings. The real answer to this case, of course, is that these men had never been charged with larceny. Larceny is a felony. The charge of larceny charges these people with having stolen the goods. It is no answer to that to say: "Well, I was brought "before the justices and charged with the unlawful possession "of the goods under the s. 24 of the Metropolitan Police Courts "Act," because that is an entirely different offence to the offence of larceny. When people are in custody for the offence of unlawful possession, with a view to their being brought before the justices to see whether they can give an account satisfactory, to the court of their possession of the goods, it is perfectly right, if it then turns out that the police are in a position to charge them with larceny, to charge them with that larceny, and then the justices can perfectly well dismiss the case of unlawful possession, because they know that a charge of larceny is about to be preferred, and the charge of larceny is a case of an

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entirely different nature to the one before them. That is quite apart from the fact that the Chingford justices would have had no jurisdiction to have heard the charge of larceny in this case, because the larceny had been committed in the Isle of Ely and not in the County of Essex.

For these reasons it is clear that the justices came to a wrong decision. The case must go back to them with an expression of the opinion of this court that they came to a wrong decision in holding that the respondents were entitled to be acquitted because they had been already charged with the offence of unlawful possession, which had not been dealt with, and that they must hear and determine whether the men were guilty of larceny, or not.

HUMPHREYS J. I am of the same opinion. In this case the justices on October 9 discharged the accused persons who were before them, no evidence being offered by the prosecution against them in respect of charges that they had in their possession goods, being certain fowls dead and alive, reasonably suspected of having been stolen or unlawfully obtained, and that they had not given the explanation which is required in those circumstances by the Metropolitan Police Courts Act, under which they were charged. There was another charge, that they were guilty of causing unnecessary suffering to these fowls, and in regard to one of the accused there was a quite different charge, that he was a deserter. The justices apparently had all these matters before them and quite properly discharged the accused on the ground that the prosecution offered no evidence. After they had been discharged with regard to the first charges made against them and acquitted, no doubt on the merits of the case, because the prosecution offered no evidence, they were then charged, in respect of those same fowls, with the offence of larceny. What they said through their solicitor, who persuaded the bench that he was talking good sense and good law, was that they could not be tried by that bench on the charge of larceny at all, or by any other bench, because they had been already acquitted. What does that mean ? In law that means quite plainly, as has been said over and over again, that they had been discharged already of the offence with which they were now being re-charged. In point of fact they had never been charged with larceny of these fowls before. They had been discharged upon matters which, except that the fowls were the same fowls, had no relation to the charge of stealing

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Flatman v. Light.

Humphreys J.

and did not consist of the same elements. I think the way in which the justices have gone astray is made plain by their opinion stated in this case. They say: "We being of opinion "that the respondents having already been charged with and "discharged of offences arising in connexion with the same "acts could not be charged again." That is not the law. The law has never said that a person cannot be charged in relation to certain acts because he has already been discharged of some offence in relation to those same acts. What the law says is that persons must not be charged with an offence if they have been already acquitted or convicted of that offence. I think the case is a very simple one. The justices ought to have heard this charge and adjudicated upon it.

Singleton J. I agree. The principle upon which a plea of autrefois acquit should be dealt with is stated at p. 135 of the 31st ed. of Archbold's Criminal Practice in these words: "It is an established rule at common law that a man cannot be "put twice in peril for the same offence." That is amplified on the next page in this way: "If therefore a man has been "tried and found to be not guilty of an offence by a court "competent to try him, the acquittal is a bar to a second "indictment for the same offence and the rule applies not only "to the offence actually charged in the first indictment but to "any offence with which he could have been properly con-"victed on the trial of the first indictment." The same principles apply, it seems to me, in the hearing of a case by a court of first instance. These respondents on the first hearing within the Metropolitan Police District were not in jeopardy upon a charge of larceny at all: the case is too clear for argument. I agree that the case must be remitted to the justices with an expression of this court's opinion, so that those who at one time appear to have confessed themselves guilty of stealing poultry may be dealt with for that offence.

Appeal allowed. Case remitted.

Solicitors for appellant: *Metcalfe, Copeman & Pettefar.*
Solicitor for respondents: *J. H. Fellowes.*

A. W. G.

C. A.

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Jan. 23;
Feb. 7.

Lord Greene M.R. and Morton L.J.

WILSON AND MEESON (a firm) *v.* PICKERING.

Bill of Exchange—Cheque crossed " Not negotiable " signed in blank—Authority normally to fill up cheque in favour of named payee—Filled up in favour of third person—Title of third person—Estoppel—Bills of Exchange Act, 1882 (45 *&* 46 *Vic., c.* 61), *s.* 81.

A partner in the plaintiff firm signed on behalf of the plaintiffs a blank crossed cheque form with the words " Not negotiable " printed on it. The form was handed to P., the plaintiffs' secretary, with instructions to fill it up for 2*l.* and insert the name of the Commissioners of Inland Revenue as payees. P. fraudently filled in the cheque for 54*l.* 4*s.* 0*d.* and inserted the name of the defendant as payee. P. then handed the cheque to the defendant in payment of a debt for that amount which she owed the defendant, who obtained payment of the cheque through her bankers. The plaintiffs sought to recover the sum of 54*l.* 4*s.* 0*d.* from the defendant :—

Held, first, that the plaintiffs were not precluded from denying the authority of P. to fill in the blank cheque in favour of the defendant. The rule that a person who signs an instrument in blank cannot be heard, as against a person who has changed his position on the faith of it, to assert that the instrument was a forgery, or was filled in in excess of the agents' authority, is confined to the case of negotiable instruments. Secondly, that the case was within the terms of s. 81 of the Bills of Exchange Act, 1882, and the defendant, as payee, had no better title to the cheque than P. from whom she took it. The plaintiff was entitled to recover.

Lloyds Bank, Ld. v. *Cooke* [1907] 1 K. B. 794, discussed and distinguished.

APPEAL from the Wandsworth county court.

The plaintiffs, carried on the business of estate agents in partnership under the name of Wilson & Meeson. They had two banking accounts, their own account and their clients' account. In October, 1944, a partner in the firm signed, on behalf of the firm, a blank crossed cheque form with the words " Not Negotiable " printed on it. The words " Clients a/c " were stamped below his signature. The partner handed the cheque form so signed to a Mrs. Paice, the firm's confidential secretary, with instructions to fill it up for 2*l.* and to insert the name of the Commissioners of Inland Revenue as payees. It was intended to use the cheque in payment of a debt due to the Inland Revenue from a client of the firm. Mrs. Paice, being personally indebted to the defendant, Mrs. Pickering, to the amount of 54*l.* 4*s.* 0*d.*, fraudulently filled in the cheque for

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

that sum and inserted the name of the defendant as payee. The defendant was not a creditor of the plaintiff or of any of their clients. Mrs. Paice handed the cheque so filled in to the defendant, who obtained payment of the cheque through her bankers. It was conceded that the defendant acted in good faith.

In this action, the plaintiffs sought to recover the sum of 54*l*. 4*s*. 0*d*. from the defendant, either as damages for conversion of the cheque or, alternatively, as moneys received by the defendant for the use of the plaintiffs. The county court judge gave judgment for the defendant on the ground that the case was covered by the decision in *Lloyds Bank, Ld.* v. *Cooke* (1), and the plaintiffs were estopped from denying the authority of Mrs. Paice to fill up the cheque.

H. G. Garland for the plaintiffs. The judge was wrong in law in holding that the plaintiffs could not allege that their agent had exceeded her authority. The decision in *Lloyds Bank, Ld.* v. *Cooke* (1) only applies to the case of negotiable instruments: *Smith* v. *Prosser* (2). The cheque in this case was crossed "Not negotiable." The plaintiffs were not indebted to the defendant and the defendant must return the money: *John* v. *Dodwell & Co., Ld.* (3). In any event, having regard to the provisions of s. 81 of the Bills of Exchange Act, 1882, Mrs. Paice could not give a good title to the crossed cheque to the defendant.

J. L. Poole for the defendant. The defendant is entitled to retain the proceeds of the cheque, because the plaintiffs are estopped from denying her title. Section 81 does not apply where the person taking the cheque is the named payee. Even if s. 81 did apply, it would not exclude the right to rely on estoppel. *Lloyds Bank, Ld.* v. *Cooke* (1) supports the estoppel relied on which applies to both negotiable and non-negotiable instruments. In *Paine* v. *Bevan* (4) the cheque was not crossed "Not "Negotiable" and the payee was not a holder for value—otherwise the facts were similar to this case. Here the defendant is a holder for value and is entitled to rely on the estoppel, since it is immaterial as between the drawer and a named payee that the cheque is crossed "Not Negotiable." According to the dictum of Ashhurst J., in *Lickbarrow* v. *Mason* (5), "wherever

(1) [1907] 1 K. B. 794.
(2) [1907] 2 K. B. 735.
(3) [1918] A. C. 563, 569.
(4) (1914) 110 L. T. 933.
(5) (1787) 2 Term Rep. 63, 70.

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" one of two innocent persons must suffer by the acts of a third, " he who has enabled such third person to occasion the loss " must sustain it." The scope of this dictum is explained per Lord Lindley in *Farquharson Brothers & Co.* v. *King & Co.* (1). By delivering the blank signed cheque to Mrs. Paice the plaintiffs enabled her to commit the fraud : *Baxendale* v. *Bennett* (2). The doctrine of estoppel by executing instruments in blank is not confined to negotiable instruments : per Bigham J. in *Union Credit Bank* v. *Mersey Docks & Harbour Board* (3). [*London Joint Stock Bank, Ld.* v. *Macmillan & Arthur* (4) was referred to.]

Cur. adv. vult.

Feb. 7. The following judgments were read :—

Lord Greene M.R. The defendant relies on what is described as a common law estoppel, the effect of which is said to be that the plaintiffs are, as against the defendant, precluded from denying the authority of Mrs. Paice to fill in the blanks in the cheque in favour of the defendant or the authority of the plaintiffs' bankers to pay the amount of the cheque to the defendant. No reliance is placed on any special provision in the Bills of Exchange Act and it is not suggested that s. 20 of that Act has any bearing on the case. The defendant merely says " I have received money from your bankers on your " cheque and you the plaintiffs are precluded from alleging that " I had no title to the cheque or that the bankers paid me the " money without your authority." The defence in the circumstances is singularly devoid of merits and in my opinion it fails on more than one ground.

In order to clear the ground it is worth pointing out that this is not a case where a customer is suing his bankers for having honoured a cheque filled in without his authority. To such a case very different considerations apply, since there is a duty in the customer to take care which arises from the relationship of banker and customer (see for example *Mercantile Bank of India, Ld.* v. *Central Bank of India, Ld.* (5), per Lord Wright delivering the judgment of the Privy Council). No similar duty exists in the present case as between the plaintiffs and the defendant. The circumstance therefore that the bank, if it

(1) [1902] A. C. 325, at p. 342.
(2) (1878) 3 Q. B. D. 525.
(3) [1899] 2 Q. B. 205 at p. 210.
(4) [1918] A. C. 777.
(5) [1938] A. C. 287, 301.

had been sued by the plaintiffs, might have successfully defended the action cannot avail the defendant. The only party who can rely upon an estoppel is the party who has been misled.

Counsel for the defendant, as one branch of his argument, endeavoured to establish a case of what is generally called "estoppel by negligence" and the well-known observation of Ashhurst J. in *Lickbarrow* v. *Mason* (1), was cited, namely, "wherever one of two innocent persons must suffer by the acts "of a third, he who has enabled such third person to occasion "the loss must sustain it." I doubt whether there is any general proposition in the books which requires so much qualification as this saying of Ashhurst J. It is perhaps singularly inappropriate in the present case, if only for the reason that the defendant, who is claiming for herself an enrichment to which she had no right, can scarcely be described as a person who "must suffer," when all that she is asked to do is to repay the money to the person from whom she obtained it. But it is sufficient for present purposes to say that this type of estoppel can only arise where there is some duty toward the person who seeks to rely on it (see *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (2), per Lord Sumner, cited by Lord Wright in the *Mercantile Bank of India* case (3)). There is a further reason why this type of estoppel cannot be relied on in the present case since the real cause, which led to the receipt of the money by the defendant, was the forgery committed by Mrs. Paice (see the judgments of the Exchequer Chamber in *Swan* v. *North British Australasian Co.* (4), and particularly the passage from the judgment of Blackburn J., cited by Lord Wright (5)). These matters are treated so fully by Lord Wright in the *Mercantile Bank of India* (5) case that I make no apology for referring to them here in a rather summary manner.

The principal argument on behalf of the defendant was based on the decision of this court in *Lloyds Bank, Ld.* v. *Cooke* (6), which the county court judge held to be conclusive of the case. The facts in that case were as follows. Cooke had applied to Lloyds Bank, Ld. for an overdraft of £1,000 which the bank agreed to allow him on the security of a promissory note to be signed by (among others) one Sanbrook. Cooke then went to Sanbrook and asked him to join in giving promissory notes to

(1) 2 Term Rep. 63, 70.
(2) [1926] A. C. 670, 693.
(3) [1938] A. C. 287, 298, 299.
(4) (1863) 2 H. & C. 175.
(5) [1938] A. C. 287, 299.
(6) [1907] 1 K. B. 794.

the bank as security for an advance which he falsely said would be 500*l*. On Sanbrook's agreeing, Cooke induced him to sign two blank stamped pieces of paper on the understanding that Cooke would fill up each of them as a promissory note for 250*l*. payable to the bank. Cooke filled up one of these pieces of paper as a promissory note for 1,000*l*., the stamp being sufficient to cover that amount, signed it and handed it to the bank who made the promised advance. In an action by the bank against Sanbrook, Lawrence J. gave judgment for Sanbrook which was reversed on appeal. The case was not covered by s. 20 of the Bills of Exchange Act and it was argued on behalf of Sanbrook that the subject of signature on blank paper was exhaustively covered by that section and that accordingly there was now no room for the operation of any estoppel at common law. This argument was rejected and the case was decided on the basis of a common law estoppel where Sanbrook was precluded as against the bank from denying the validity of the note which was, of course, a forgery.

One distinction between that case and the present leaps to the eye. There the bank had acted upon the representation to its prejudice in that it made the advance of 1,000*l*. to Cooke. In the present case there is no allegation in the defence that the defendant acted upon the representation to her prejudice. Nor is there any other material in the case to suggest that she in fact did so. I do not see how it could be suggested that by accepting the cheque from Mrs. Paice she had in some way prejudiced her position vis-à-vis Mrs. Paice. It could not possibly be suggested that the debt owing by Mrs. Paice to the defendant was extinguished by the acceptance of the cheque since the cheque was a forged instrument and the defendant's acceptance of it was procured by the fraud of Mrs. Paice. If it had been shown that in reliance on the cheque the defendant had refrained from suing Mrs. Paice or given her further credit the position might well have been different. But there is no suggestion of the kind. These considerations are, in my opinion, sufficient to dispose of the case. It is a fundamental rule with regard to estoppels in pais that a party is only entitled to rely on such an estoppel, if he can show that on the faith of the representation he has acted to his prejudice and it is perhaps sufficient to refer in support of this proposition to the principles enunciated by Brett J. in *Carr* v. *London & North Western Ry. Co.* (1).

(1) (1875) L. R. 10 C. P. 307, 316, 317.

But quite apart from this I am of opinion that *Lloyds Bank, Ld.* v. *Cooke* (1) does not govern the present case. Sir Richard Henn Collins M.R., in that case thought that the case was governed by the authority of *Brocklesby* v. *Temperance Permanent Building Society* (2), which, if I may respectfully say so, appears to me to have been a very different class of case. But in any event the authority of *Cooke's* case cannot in my opinion be extended beyond the particular facts there in question. The application of the principle of estoppel to instruments handed to an agent in blank, in order that they may be filled in by him, has been much debated in the past. The view, which so far as my researches go, appears to me to have the weight of judicial opinion behind it is that, apart, of course, from some specific representation of authority or some holding out or some special character of the agent from which his authority would naturally be inferred, the rule that a person who signs an instrument in blank cannot be heard as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority, is confined to the case of negotiable instruments. I may refer in particular to *Swan* v. *The North British Australasian Co., Ld.* (3). The instrument in Cooke's case was such a negotiable instrument. There appear to me to be good reasons why such an estoppel, which seems to result in an exception to the accepted notions that a forged document can convey no title, should be recognized in the case of negotiable instruments. As Blackburn J. said in *Swan's* case (4): " It is sufficient to point out that a party signing in " blank a cheque or bill, or other negotiable instrument, does " intend that it shall be filled up and delivered to a series of " holders, and therefore he stands to all those holders in the " position indicated in the first branch of the judgment in *Free-" man* v. *Cooke* (5)." Byles J. said (6) this : " The object of the " law merchant, as to bills and notes made or become payable " to bearer, is to secure their circulation as money ; therefore " honest acquisition confers title. To this despotic but " necessary principle the ordinary rules of the common law " are made to bend. The misapplication of a genuine signature " written across a slip of stamped paper (which transaction

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(1) [1907] 1 K. B. 794.
(2) [1895] A. C. 173.
(3) 2 H. & C. 175.
(4) Ibid. 175, 183.
(5) (1848) 2 Exch. 654.
(6) 2 H. & C. 175, 184, 185.

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" being a forgery would in ordinary cases convey no title) may " give a good title to any sum fraudulently inscribed within the " limits of the stamp, and in America, where there are no " stamp laws, to any sum whatsoever. Negligence in the " maker of an instrument payable to bearer makes no difference " in his liability to an honest holder for value ; the instrument " may be lost by the maker without his negligence or stolen " from him, still he must pay. The negligence of the holder, on " the other hand, makes no difference in his title. However " gross the holder's negligence, if it stops short of fraud he " has a title. So that the argument from negotiable instru- " ments if it were applicable might be retorted, for there, as " here, a plaintiff who has been guilty of negligence may prevail " against a defendant who has been defrauded without any " negligence of his own at all. The truth is that in the case of " a bill of exchange or promissory note, as well as in the case of " a deed, the law respects the nature and uses of the instrument " more than its own ordinary rules."

To take a more recent case, decided subsequently to *Lloyds Bank, Ld.* v. *Cooke* (1), I find in the judgments of this court in *Smith* v. *Prosser* (2), what appears to me to be a clear indication that in the opinion of all the members of the court this class of estoppel is confined to the case of negotiable instruments. In the present case the cheque was on its face expressed to be " not " negotiable," the result of which was that it was deprived of the peculiar characteristic that makes it possible for a transferor of a negotiable instrument to confer a better title than he has himself. The consequences of marking the cheque not negotiable are to be found in s. 81 of the Bills of Exchange Act, 1882, which provides as follows : " Where a person takes a " crossed cheque which bears on it the words 'Not " 'Negotiable,' he shall not have and shall not be capable of " giving a better title to the cheque than that which the person " from whom he took it had."

Now it is understandable that there should be a special rule of estoppel in the case of negotiable instruments which, broadly speaking, pass like currency from hand to hand. They are in a sense dangerous things since, if a doubt exists as to the right of a holder in due course to rely on their apparent authenticity, consequences will follow highly prejudicial to the confidence which is required for the due conduct of commercial affairs. It seems natural, therefore, that, broadly speaking, a person

(1) [1907] 1 K. B. 794.

(2) [1907] 2 K. B. 735.

who puts an inchoate instrument of that nature into circulation must be taken to have authorized whatever is subsequently inserted in it in order to make it a complete instrument. I think therefore that, as this was not and was never intended to be a negotiable instrument, the estoppel relied upon could not in any event be admitted. But as Bailache J. held in *Paine* v. *Bevan* (1) even in the case of negotiable instruments the estoppel does not operate in favour of a holder who has not given value. This is, I think, another way of stating the application of the rule that a person can only set up an estoppel where he has acted on the faith of the alleged representation to his detriment. The defendants in *Paine* v. *Bevan* (1) were in no better position than that of donees of the cheque, which is precisely the case with the defendant here.

The last argument to which I need refer was that advanced on behalf of the plaintiffs, namely, that in any event the defendant obtained no title to the cheque by reason of s. 81 of the Bills of Exchange Act, 1882. On behalf of the defendant it was said that the section has no application where the person taking a cheque marked " not negotiable " is himself the payee named on the cheque. I can see no justification for writing into the section a qualification of this kind, since the words appear to me to be clear and unambiguous. In the present case the defendant " took " such a cheque and she was undoubtedly a " person." She took the cheque from Mrs. Paice who, again, was undoubtedly a " person." Mrs. Paice had no title to the cheque and, accordingly, in the very words of the section the defendant did not have a better title than Mrs. Paice.

The appeal is allowed with costs.

MORTON L.J. Mr. Garland contends, on the plaintiffs' behalf, that this matter is concluded by s. 81 of the Bills of Exchange Act, 1882, which is in the following terms : " Where a person " takes a crossed cheque which bears on it the words ' not " ' negotiable,' he shall not have and shall not be capable of " giving a better title to the cheque than that which the " person from whom he took it had." It is conceded by Mr. Poole, for the defendant, that the cheque was a forged document, and that Mrs. Paice must be regarded as having stolen it before she handed it to the defendant. He contends, however : (1.) that s. 81 has no application to the payee of a cheque, and that the words " a person " in the section cannot

(1) 110 L. T. 933.

include the payee; (2.) alternatively, that the plaintiffs are estopped from alleging that Mrs. Paice had no title to the cheque.

As to the first point, it is no doubt true that when the drawer puts the words "Not Negotiable" on a cheque his object is, as a rule, to ensure that it is not cashed by anyone except the payee: see *Great Western Ry.* v. *London & County Banking Co.* (1). In my view, however, there is no good reason for excluding from the operation of the section a case such as the present, where the name of the payee has been fraudulently inserted by a forger, and the forger, having stolen the cheque, hands it to the payee. I see no reason why, in such a case, the payee should have a title to the cheque better than the title of the person from whom he took it. The present case comes exactly within the terms of s. 81, unless we accept Mr. Poole's invitation to construe the very wide words "a person" as excluding the payee, and I cannot so construe them, in the absence of any compelling reason. The result is that, unless the plaintiffs are in some way estopped from giving the true facts in evidence in this case, they must succeed.

As I have already said, the facts were agreed, but Mr. Garland does not contend that this point prevents the defendant from relying upon an estoppel, if she would otherwise be able to rely thereon. For my part, however, I cannot see that any estoppel arises in the present case. In the case of *Lloyds Bank, Ld.* v. *Cooke* (2), the document signed by the defendant (to quote Collins M.R.) "was intended to have all the properties of a "negotiable instrument, and as such to be capable of passing "from hand to hand as part of the currency."

Each member of the court laid stress upon the negotiable character of the document, and Fletcher Moulton L.J. (as he then was) quoted the judgment of Lord Selborne in *France* v. *Clark* (3): "The person who has signed a negotiable instrument "in blank or with blank spaces is (on account of the negotiable "character of that instrument) estopped by the law merchant "from disputing any alteration made on the document after it "has left his hands by filling up blanks (or otherwise in a way "not ex facie fraudulent) as against a bona fide holder for value "without notice." The present case stands on a very different footing. Having regard to s. 81 of the Act, the words "Not "Negotiable" amounted to an express statement, to any person

(1) [1901] A. C. 414, 422.
(2) [1907] 1 K. B. 794, 803.
(3) (1884) 26 Ch. D. 257, 262.

taking the cheque, that he would get no better title than that possessed by the person from whom he took it. The defendant took the risk of Mrs. Paice having no title to the cheque, and Mrs. Paice in fact had no title. I would add that in the present case I can draw no distinction between the title to the cheque itself and the title to the money obtained or represented by it: see per Lord Halsbury L.C. in *Great Western Ry. Co.* v. *London & Counties Banking Co., Ld.* (1).

For these reasons I am of opinion that the defence to this action fails. It is therefore unnecessary for me to consider certain further contentions put forward on behalf of the plaintiffs. In my judgment the appeal should be allowed, and judgment entered for the plaintiffs for 54*l*. 4*s*. 0*d*., with costs here and below.

Since writing this judgment I have had the privilege of reading the judgment of the Master of the Rolls, wherein he gives additional reasons why the defendant in this case cannot rely on any estoppel. With these reasons, and with his judgment as a whole, I respectfully agree.

Appeal allowed.

Solicitors for the plaintiffs: *Philip Conway, Thomas & Co.*
Solicitor for the defendants: *H. N. Robbins, Richmond.*

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(1) [1901] A. C. 414, 418.

HEMSWORTH *v.* HEMSWORTH.

1946
Jan. 24, 25.
Denning J.

Revenue—Income tax—Deduction—Separation deed between husband and wife—Provision for annual payments to wife—Some payments made without deduction of tax—Arrears—Extent of husband's right to deduct tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19, *sub-r.* 1.

To enable a person making a payment in pursuance of an agreement for an annual payment of money to exercise his right to deduct income tax under r. 19, sub-r. 1, of the All Schedules Rules of the Income Tax Act, 1918, he must ascertain the amount of the deduction and of the residue and must notify the creditor of the deduction and pay him the residue. If he pays without such notification, the payment will be taken to have been made without deduction and to be a discharge only in respect of the amount actually paid.

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Where therefore a husband made some payments to his wife in accordance with a separation deed without any notification that any tax was deducted and then fell into arrears and she subsequently sued for the arrears and obtained judgment :—

Held, that the husband was discharged only in respect of the amount actually paid to his wife, but that he could deduct tax from the arrears claimed by his wife and that judgment should be entered for the amount of the residue.

Taylor v. *Taylor* [1938] 1 K. B. 320 applied and explained.

ACTION tried by Denning J.

The plaintiff, a married woman, claimed from the defendant, her husband, arrears of instalments which she alleged were due to her under a separation deed, dated April 16, 1938. By the terms of the deed the parties agreed to live separate and apart and the husband agreed to pay to the wife 365*l*. a year or, if his own income should be reduced, a proportionately reduced amount, subject to a condition, inter alia, that if the wife should at any time directly or indirectly annoy her husband or any member or members of his family or any of his friends or any person or persons with whom he might reside, then the 365*l*. a year should cease to be payable. The husband paid the full amount without any deduction for income tax until June 13, 1940, when he reduced his payments to 22*l*. a month. Later he reduced his payments further and finally in November, 1942, he stopped them altogether.

The wife commenced proceedings by writ issued on March 1, 1944, claiming 1,096*l*. 5*s*. balance of instalments due and payable under the deed.

By his defence, the husband pleaded that the wife had broken the condition not to annoy him, relying on certain acts done and letters written by her. He also pleaded that if the annuity were payable after May, 1940, then it was payable after deduction of income tax by the defendant. He claimed that he could deduct tax on the amounts that had fallen due under the deed, whether paid, partly paid or unpaid. The wife contended that tax could only be deducted on the balance still unpaid. The wife's claim was eventually reduced to 484*l*. 19*s*. 8*d*. after allowing for the husband's decrease in income as provided by the deed and after deduction of tax on the balance still unpaid.

Mitchison for the plaintiff.

T. G. Roche for the defendant.

DENNING J., after holding that it was not the predominant purpose of the acts relied on to annoy and that therefore none of those acts were breaches of the condition, and after hearing argument as to how the amount payable under the deed should be calculated and what credit should be allowed to the defendant in respect of income tax, continued: Some of the observations in *Taylor* v. *Taylor* (1) are not easy to reconcile with the actual decision in that case, but on the true construction of r. 19, sub-r. 1, of the All Schedules Rules of the Income Tax Act, 1918 (2), coupled with the decision in *Taylor* v. *Taylor* (1), I am of opinion that in order to exercise his right of deduction the person making any payment or part-payment in pursuance of his obligation must make a calculation in order to ascertain the amount of the deduction and of the residue and must then notify the other person of the deduction and pay him the residue. Unless such notification is made, the person to whom the payment is made has no information on which to allow such deduction and cannot be called on to allow it, and unless the person paying has made such a calculation he is not acquitted and discharged of so much money as is represented by the deduction, nor has he paid the residue. If the person pays without any such notification it must be taken to be a payment made without deduction and to be a discharge only in respect of the amount actually paid; and when the creditor sues for the balance which remains due over and above the sums actually paid, the debtor, when he comes to pay that balance, is entitled to deduct tax on that balance and pay the residue. That right only arises on payment, but *Taylor* v. *Taylor* (1) shows that judgment should be entered only for the residue. In this particular case the debtor made payments without making any deduction and without making any

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(1) [1938] 1 K. B. 320.

(2) Income Tax Act, 1918, All Schedules Rules, r. 19, sub-r. 1: "Where any yearly interest of "money, annuity, or any other "annual payment . . . . is pay-"able wholly out of profits or "gains brought into charge to tax ". . . . . the person liable to make "such payment . . . . shall be "entitled, on making such pay-"ment, to deduct and retain there-"out a sum representing the "amount of the tax thereon at the "rate or rates of tax in force "during the period through which "the said payment was accruing "due. The person to whom such "payment is made shall allow such "deduction upon the receipt of "the residue of the same, and the "person making such deduction "shall be acquitted and dis-"charged of so much money as is "represented by the deduction, as "if that sum had been actually "paid."

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notification to the creditor on the matter. The payments which he made therefore only discharged the debt in respect of the amounts actually paid. When the creditor sues for the balance, tax can be deducted on the balance which is sued for and only on that balance.

In the result, I hold that the calculation submitted by the plaintiff is correct and judgment should be entered for the sum of 484*l.* 19*s.* 8*d.* There will be an undertaking by the Defendant to hand over the corresponding certificates of deduction of tax.

Solicitors for plaintiff: *Freke Palmer, Romain & Romain.*
Solicitors for defendant: *Andrew, Purves, Sutton & Creery.*

H. A. P.

1946
May 9

Lord Goddard C.J., Humphreys and Singleton JJ.

SEYMOUR *v.* CHERNIKEEF.

Business name—Registration—Single woman carrying on business under true surname—Name changed on marriage—Business continued under old name—Necessity for registration—Registration of Business Names Act, 1916 (6 & 7 *Geo.* 5, *c.* 58), *s.* 1.

A woman carrying on a business under her true surname who changes her name in consequence of marriage but does not change the name of her business must be registered under the Registration of Business Names Act, 1916.

CASE STATED by a Metropolitan magistrate.

The respondent, a married woman, was charged at the West London Magistrate's Court on January 29, 1946, on an information brought by the appellant, acting for the Board of Trade, for that on February 24, 1945, and subsequently between that date and August 23, 1945, she, being a person required by the Registration of Business Names Act, 1916, to furnish a statement of particulars to the Registrar of Business Names in respect of a business carried on by her under the name of "Jean Frances," without reasonable excuse made default in doing so contrary to ss. 1, 3 and 7 of the Act (1).

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(1) Registration of Business Names Act, 1916, s. 1: "Subject "to the provisions of this Act ". . . . (*b*) Every individual "having a place of business in the "United Kingdom and carrying "on business under a business "name which does not consist of

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The following facts were proved or admitted. The respondent at all material times prior to February 1, 1940, carried on business at Montpelier Square as a manufacturer and wholesaler of leather handbags and belts under the name of " Jean Frances," which name consisted of one of her true Christian names and her true surname. On February 1, 1940, the respondent married a Mr. Chernikeef. Thereafter she continued to carry on her business under the business name of " Jean Frances." She did not at any time after February 1, 1940, furnish a statement of particulars to the Registrar of Business Names in respect of her business in the manner and within the time specified in the Act or at all.

It was contended for the respondent that by reason of the exception in para. (*c*) of s. 1 of the Act she was not required after February 1, 1940, to register under that Act.

On behalf of the appellant it was contended that para. (*c*) of s. 1 of the Act and the exception therein had no application to the case and that since the respondent after her marriage carried on business under a business name which did not include the name of Chernikeef, her true surname, she was bound to register under para. (*b*).

The magistrate was of the opinion that the contention of the respondent was right and dismissed the information, but stated this case for the opinion of the High Court.

H. L. Parker for the appellant. The decision of the magistrate was wrong. A woman who changes her name in consequence of marriage admittedly comes within para. (*c*), but she is caught by para. (*b*), which is independent of para. (*c*). Paragraph (*c*) does not qualify para. (*b*), but is a separate provision. The effect is that a woman is excused from registering only if she changes the name of her business as well as her own name on marriage, since in that case para. (*b*) would not apply. But if she does not change the name of her business then she is carrying on business under a name other than her true surname within para. (*b*) and must be registered.

" his true surname without any " addition other than his true " Christian names or the initials " thereof; (*c*) Every individual " . . . . having a place of busi- " ness in the United Kingdom, " who . . . . has either before or " after the passing of this Act " changed his name, except in the " case of a woman in consequence " of marriage; shall be registered " in the manner directed by this " Act . . . ."

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The respondent did not appear.

LORD GODDARD C.J. The respondent, whose former name was Miss Jean Frances, carried on busines as " Jean Frances." In 1940 she married Mr. Chernikeef, but continued to carry on business under the name of " Jean Frances." She did not register her change of name and it is now said that she has committed an offence under the Act. The magistrate took the view, which ninety-nine out of a hundred laymen would have taken, that she was afforded an excuse by para. (*c*) of s. 1 of the Act. I think she may be pardoned for believing that under that paragraph she was not required to register. For a long time I thought that the magistrate was right, but Mr. Parker has succeeded in convincing me that he was wrong.

I think the position is this. Paragraph (*b*) of s. 1 requires a person carrying on a business under a business name, which does not consist of his own surname, to register. Paragraph (*c*) applies where a man carries on a business under his own name and then changes his name and the name of his business. In that case the Act says the public are to be informed that the business was formerly carried on under another name, but married women are excepted from that provision. So if the respondent had carried on business as Chernikeef she would not have had to show the change. I think the Act is so drafted that it would lead most people to think that a married woman was not obliged to register her change of name on marriage, even if she did not change the name under which she carried on business. Therefore, although an offence has been committed here, and the case must go back to the magistrate with a direction to find the case proved, it seems to me to be a case with which the magistrate may deal in any way he thinks fit.

HUMPHREYS J.: I agree as to the law, but I think that the respondent was perfectly justified in thinking that she was exempted from the necessity to register. In my opinion, she was not in fact exempt for the reason that there are three separate matters dealt with in s. 1 of the Act. This case clearly does not come within para. (*a*). On the other hand, it is clearly within para. (*b*). There is no answer to that. Looking at para. (*c*), which at first sight appears to qualify para. (*b*), I think that paragraph deals with a separate matter altogether and that it applies where a person carrying on a business changes his name, when he is bound to register that fact. The only person not required to register under that paragraph is a married woman. But the respondent is required to register her change of name, because under para. (*b*) she is carrying on a business under a business name which does not consist of her true surname. I agree that this case should be sent back to the magistrate with a direction to find the case proved.

SINGLETON J.: I agree.

Appeal allowed.

Solicitor for the appellant: *Solicitor to the Board of Trade.*

H. A. P.

1946
Mar. 25, 26, 28.

Atkinson J.

DWYER AND ANOTHER v. MANSFIELD.

Nuisance—Shopkeeper—Sale of food in short supply—Small quantity only sold to each customer—Queues of customers on highway extending in front of neighbouring shops—Alleged loss of custom at those shops—Quantum and duration of queues—Shopkeeper doing nothing unreasonbale or unnecessary.

The defendant, a shopkeeper, had a licence from the Ministry of Food to sell vegetables and fruit. At a time when there was a scarcity of potatoes, he sold only 1 lb. per ration book. Queues of customers at the defendant's shop formed which, at times, extended on the highway in front of neighbouring shops. In an action by the keepers of those shops against the defendant, the judge found that neither nuisance nor damage to the plaintiffs had been proved:—

Held also, that even if a nuisance had been established, since the defendant, in distributing food essential for the public, had been carrying on his business in a normal and proper way, without doing anything unreasonable or unnecessary, the defendant could not be said to have created and so to be responsible for the nuisance; the queues at the time were due to the short supply of potatoes.

ACTION claiming damages for nuisance.

The plaintiff Dwyer, carried on business as The Empire Bullion Co., a seller of jewelry at No. 136; the plaintiff Kornfield carried on business as The Stormproof Rubber Co., selling waterproof goods, at No. 130; and the defendant, Mansfield carried on business as a greengrocer at No. 134 High Street North, East Ham. The two plaintiffs claimed damages for nuisance against the defendant alleging interference with their respective businesses by the causing of queues to collect opposite their shops, whereby they lost custom. The queues complained of were two, composed of the defendant's customers: the one at times extending opposite Dwyer's shop and the other reaching past the intervening shop, No. 132, at times up to, and at others beyond, Kornfield's shop. The queues appeared late in January or February, 1945, they were said not to be serious in March and April, but that at the end of May and in June, 1945, they were considerable, and on July 2, 1945, the writ was issued. Kornfield said that the queues continued as a subject of complaint until August. Since then there had been no cause of complaint and the plaintiffs did not ask for an injunction. The building line of the shops was set back four feet from the highway but the forecourt was indistinguishable from the pavement.

The defendant had a licence from the Ministry of Food to sell vegetables and fruit. His evidence, which the judge accepted, was that in February he received a consignment of oranges which he was bound to sell to all comers. Queues formed for the purchase of the oranges, but he obtained permission from the police to sell the oranges at the back of his shop, the queue then approaching from an alley at the back of his premises. In June, 1945, the trouble was the potato shortage and he sold only one pound per ration book.

Borneman for the defendant. On the facts proved there was here no nuisance and no damage. The contention that if there were a nuisance, it should have been abated by the police, is not open to the defendant in this court. See *Lyons, Sons & Co.* v. *Gulliver* (1); but owing to the dissenting judgment of Phillimore L.J., the defendant desires to keep the point open. Further, on the assumption that there was here a nuisance, the defendant did not create it, as, for instance, did the shopkeeper in *Rex* v. *Carlile* (2). The defendant merely carried on his business under the conditions of a time of war: he did nothing that was unnecessary or unreasonable: *Harper* v. *G. N. Haden & Sons, Ld.* (3). As Lord Hanworth M.R. said in that case (4): "A long sequence of authorities and judicial "pronouncements can be referred to which declare that many "inconveniences of the kind in question in this action must be

(1) [1914] 1 Ch. 631.
(2) (1834) 6 C. & P. 636.
(3) [1933] Ch. 298.
(4) Ibid. 302.

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" submitted to without there being a legal remedy in respect " of them . . . . It is when the inconvenience is unreasonably " prolonged that the public have a right to complain and the " party may be indicted for a nuisance : see per Lord Ellen- " borough in *Rex* v. *Jones* (1); *A.-G.* v. *W. H. Smith & Son* (2)." The fact that the goods sold by the defendant were in short supply was not the fault of the defendant. There is no case in the books where a shop-keeper who has merely carried on his business in a normal and proper manner has been held liable for attracting customers on to the highway.

Crispin for the plaintiffs. There was here a nuisance from which each of the plaintiffs suffered damage. As Cozens-Hardy M.R. said in *Lyons, Sons & Co.* v. *Gulliver* (3): " I cannot bring myself to doubt that this is a serious nuisance " and annoyance by which the plaintiffs were specially affected " and that it is not a case in which it is at all necessary for them " to say : ' We can prove that we have lost 1*l*., 2*l*. or 3*l*. by " ' reason of this '." The causa causans of the nuisance was in each case the queue, but the causa sine qua non was the business carried on by the defendant at his shop : *Wilkes* v. *Hungerford Market Co.* (4) approved by Greer L.J., and semble Scrutton L.J. in *Blundy Clark & Co.* v. *L. & N.E. Railway Co.* (5), though Slesser L.J. took the contrary view (6). *Wilkes* v. *Hungerford Market Co.* was also approved by Lord Hanworth M.R. in *Harper* v. *G. N. Haden & Sons, Ld.* (7). That the defendant caused this nuisance is concluded by *Barber* v. *Penley* (8), the case of a crowd outside a theatre and *Lyons, Sons & Co.* v. *Gulliver* (9), the case of a crowd outside a music hall. Bray J. in *Stearn* v. *Prentice Bros., Ld.* (10) said : "*Rex* v. *Moore* (11) " and the cases which followed it, all cases of nuisance, " were cited to us. They lay down that if a person collects " together a crowd of people to the annoyance of his neighbours " this is a nuisance." In *Benjamin* v. *Storr* (12) Brett J. said (13): " So, if by reason of the access to his premises being obstructed " for an unreasonable time and in an unreasonable manner, the " plaintiff's customers were prevented from coming to his coffee " shop, and he suffered a material diminution of trade, that

(1) (1812) 3 Camp. 229.
(2) (1910) 26 T. L. R. 482.
(3) [1914] 1 Ch. 631, 641.
(4) (1835) 2 Bing. N. C. 281.
(5) [1931] 2 K. B. 352, 362.
(6) Ibid. 372.
(7) [1933] Ch. 298, 306 7.
(8) [1893] 2 Ch. 447.
(9) [1914] 1 Ch. 631.
(10) [1919] 1 K. B. 397.
(11) (1832) 3 B. & Ad. 184.
(12) (1874) L. R. 9 C. P. 400.
(13) Ibid. 407.

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"might be a particular, a direct and a substantial damage." In peace time there could be no colourable defence to this action and in times of war and scarcity the laws are not silent. The canon of reasonableness is the same as that in the early months of 1939, since there has been no emergency legislation to change it.

(*Fritz* v. *Hobson* (1); *Wagstaff* v. *Edison Bell Phonograph Corporation, Ld.* (2); *Campbell* v. *Metropolitan Borough of Paddington* (3); *Sedleigh-Denfield and O'Callaghan and Others* (4); Winfield, Law of Torts (3rd ed.), at pp. 440-2 and Salmond, Law of Torts (10th ed.), at p. 229 and pp. 272-4, were also cited.)

ATKINSON J. stated that, on the evidence, applying the law as laid down in *Harper* v. *G. N. Haden & Sons, Ld.* (5), the plaintiff, Dwyer, had failed to prove that anything happened which was in fact a nuisance and that he thought that was so in Kornfield's case also, though there were several occasions on which it might be said that the queue amounted to a nuisance; but he had no evidence of the length of time the queues were there and they happened so seldom that he was satisfied that it would be very difficult to hold that a nuisance was established and continued: Even if a nuisance had been established, that would not suffice since the plaintiffs must prove that the nuisance was due to an act for which the defendant was to blame, due to an act which was unlawful, or the doing of something which was unnecessary and unreasonable and, therefore, unjustifiable. It appears from the cases where a nuisance has been established by the formation of a crowd obstructing the highway that the defendant had always done something to create the crowd. See *Barber* v. *Penley* (6) and *Lyons, Sons & Co.* v. *Gulliver* (7)—the two theatre cases in both of which the plaintiffs were held justified in bringing an action. In the later case, Phillimore L.J. vigorously dissented. In these cases and in every case in which an injunction has been granted, the defendant has been responsible for the invitation. He has done that which created the demand, invited the public to that portion of the highway and brought them there. In each case if the doors of the threatre or music hall had been opened earlier the crowds would have been reduced or avoided and in each case the defendant had done something which was unnecessary. The most helpful authority, in my opinion, is that of *Rex* v. *Carlile* (1) where it was proved that the defendant, a shopkeeper, placed in his shop window effigies of a bishop labelled "spiritual broker," of a man in lay dress labelled "temporal broker," and later of the devil, the bishop's arm being tucked into that of the devil, thus causing crowds on the highway to view the effigies which interfered with access to other shops. He was indicted and found guilty of creating a nuisance because he had done something with the intention of attracting people on the highway near his shop which was wholly unnecessary for the carrying on of his business. Park J., in the course of his summing-up, said (2): "In the present case, "one question is, whether this act of the defendant was at all "necessary for the bona fide carrying on of his trade; for if it "was, and he did not take up more time in the doing of it than "was necessary, the law would do what it could to protect him. "Now the defendant is so far from thinking that this exhibition "is essential to the carrying on of his trade, that he told us "to-day that he considers his trade to be injured by it." That was the comment made by Park J. in the case of a shopkeeper to whose shop the public are attracted when the shopkeeper has carried on business bona fide and has done nothing but what was necessary for the carrying on of his business, "the law would do what it could to protect him." I have been referred to no authority, nor have I been able to find an authority where a shopkeeper carrying on his business in the ordinary normal and proper way has been indicted for or had an action brought against him for nuisance because of customers crowding to his shop. If a shopkeeper distributing food essential for the public and carrying on his business in a proper way were liable to an action for nuisance, because queues formed on the highway from the anxiety of the public to get food which is in short supply, there must have been many such cases in the past years. To hold that an action would lie in such a case would result in a shopkeeper carrying on business under conditions that were intolerable. Judicial views have differed as to how far the police ought to interfere. Phillimore L.J. in his dissenting judgment in *Lyons, Sons & Co.* v. *Gulliver* (3), thought that if what was being done amounted to a a nuisance it was for the police to take action, but the law

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(1) (1880) 14 Ch. D. 542.
(2) (1893) 10 T. L. R. 80.
(3) [1911] 1 K. B. 869.
(4) [1940] A. C. 880.
(5) [1933] Ch. 298, 306-7.
(6) [1993] 2 Ch. 447.
(7) [1914] 1 Ch. 631.

(1) 6 C. & P. 636.
(2) Ibid. 649.
(3) [1914] 1 Ch. 652.

appears to be that if a nuisance is created by a frontager on the highway he cannot escape liability by pleading that the police ought to have seen that the nuisance did not take place.

Accordingly, in this case even if a nuisance had been proved, I take the view that it has not been proved that the defendant created, or was responsible for, it. I am satisfied from the evidence of the defendant that it was the short supply of potatoes which caused these queues to collect and that short supply was not a matter for which the defendant was responsible. Asking myself again the question: "Did the "defendant do anything which was unreasonable or "unnecessary," and so unjustifiable, I am satisfied that he did not. On the contrary I think that the defendant did everything which he could to meet the situation. The plaintiffs, therefore, fail also on that ground.

[His Lordship then stated that the plaintiffs had failed to prove that they had suffered damage.]

Judgment for defendant.

Solicitors for plaintiffs: *Duthie, Hart & Duthie.*
Solicitor for defendant: *James H. Fellowes.*

C. G. M.

BOMFORD v. SOUTH WORCESTERSHIRE ASSESSMENT COMMITTEE AND OTHERS.

1946
May 2.
Lord Goddard C.J., Humphreys and Singleton JJ.

Rating—Agricultural cottage—Restrictions on use and on weekly sum recoverable by occupier—Principle of valuation—Agricultural Wages (Regulation) Act, 1924 (14 & 15 *Geo.* 5, *c.* 37)—*Agricultural Wages (Regulation) Amendment Act,* 1940 (3 & 4 *Geo.* 6, *c.* 17)—*Local Government Act,* 1929 (19 & 20 *Geo.* 5, *c.* 17), *s.* 72.

The hypothetical tenant to whom regard is to be had in assessing the gross rateable value of an agricultural cottage under s. 72 of the Local Government Act, 1929 (1) is the farmer, who may be willing, notwithstanding that the cottage can only be occupied

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

(1) By s. 72 of the Local Government Act, 1929: "As from the "first day of April, nineteen "hundred and thirty, the gross "value for rating purposes of a "house occupied in connexion "with agricultural land and used "as the dwelling house of a person "who—(*a*) is primarily engaged in "carrying on or directing agri- "cultural operations on that land; "or (*b*) is employed in agricultural "operations on that land in the "service of the occupier thereof

and used in the manner there stated, to pay more in rent for it than the maximum amount which he can lawfully receive in respect of it whether by deduction from the wages of the agricultural worker living in it or by way of rent from such a worker.

Where, therefore, the maximum value at which an agricultural cottage might be reckoned as payment of wages in lieu of cash was prescribed for a certain area by order made under the Agricultural Wages (Regulation) Acts, 1924 and 1940, as 3*s.* a week, and a cottage in that area occupied by a farmer was used as a dwelling by a worker on his farm whose right so to use it was dependent on his being employed by that farmer:—

Held, that the gross rateable value of the cottage was not to be limited by reference to the weekly sum of 3*s.* which was the most which the farmer could receive for it, by deduction from wages or otherwise, from the worker, since a farmer might be willing to pay a larger sum in rent for the cottage in order to secure accommodation for an agricultural worker whom he wished to employ.

Per Singleton J. In estimating gross annual value under s. 72, regard must be had to the fact that the farmer as occupier can only use the cottage in the manner stated in the section, and that while he so uses it the maximum sum which he can recover in respect of it is fixed by statute so that its value to him is accordingly limited. Therefore, while the gross rateable value does not have to be fixed by reference to that maximum sum, the fact that it is the limit of what the farmer can recover for the cottage from the worker is a fact to which regard must be had in fixing that value.

CASE STATED by Worcestershire quarter sessions, under s. 11 of the Quarter Sessions Act, 1849.

In the valuation list for the rating area of the rural district of Pershore, Worcestershire, the appellant, James Ferguson Bomford, a farmer, was assessed as the occupier of two cottages, numbers 45 and 46 Salters Lane, Pershore, in the sums of 6*l.* gross and 4*l.* net rateable value in respect of each cottage. On March 23, 1944, the first respondents, the rating authority for the rural district of Pershore, made a proposal to amend the valuation list by increasing those gross and net values to 12*l.* and 7*l.* for No. 45 and to 10*l.* and 6*l.* for No. 46. The appellant having given notice of objection to that proposal, the second respondents, the South Worcestershire Assessment Area Assess-

" and is entitled, whether as " tenant or otherwise, so to use the " house only while so employed, " shall, so long as the house is so " occupied and used, be estimated " by reference to the rent at which " the house might reasonably be " expected to let from year to " year if it could not be occupied " and used otherwise than as " aforesaid."

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BOMFORD v. SOUTH WORCESTERSHIRE ASSESSMENT COMMITTEE.

ment Committee, heard the proposal and objection and determined to amend the valuation list by increasing the gross and net rateable values as proposed by the rating authority. The appellant having given notice of appeal to quarter sessions, this special case was stated by consent of the parties.

The appellant occupied the two cottages for the accommodation of agricultural workers employed by him on his land. The cottages were not to let to those workers, who lived in them by virtue of their employment. No. 45 Salters Lane was used as the dwelling of a foreman who received 4*l.* a week without any deduction in respect of the cottage, and No. 46 as the dwelling of a tractor driver who received, on the average, 3*l.* 15*s.* a week, from which 3*s.* a week was deducted in respect of the cottage. Each cottage was "a house occupied in "connexion with agricultural land and used as the dwelling-"house of a person who . . . . is employed in agricultural "operations on that land in the service of the occupier thereof "and is entitled . . . . so to use the house only while so "employed . . . ." as prescribed by s. 72 of the Local Government Act, 1929.

Acting under the Agricultural Wages Board (Regulation) Acts, 1924 and 1940, the agricultural wages board constituted under those Acts made an order dated December 1, 1943, fixing minimum rates of wages for agricultural workers in the county of Worcester, and the Worcestershire Agricultural Wages Committee by order dated December 12, 1941, defined the benefits or advantages which might be reckoned as payment of wages in lieu of payment in cash, and the value at which they were to be reckoned, including the following: "(*a*) cottage "including any garden provided with the cottage—3*s.* per "week, less any rent or rates which may be paid by "the occupier." That 3*s.* a week was a sum fixed throughout the county of Worcester irrespective of the size or amenities of any cottage. The minimum wages payable under the Agricultural Wages (Regulation) Acts and under the orders were 3*l.* 5*s.* a week until March 4, 1945, and after that date 3*l.* 10*s.* a week.

It was contended for the appellant farmer: (*a*) that, by virtue of the Agricultural Wages (Regulation) Acts and orders made thereunder, he might not deduct from the wages of a person employed in agricultural operations on his land in his service any sum greater than 3*s.* a week in respect of a cottage; (*b*) that he could not, by letting the cottages to persons employed in agricultural operations on his land in his service, or otherwise, lawfully receive from them any sum greater than 3*s*. a week; (*c*) that the gross value of each of the cottages, so long as occupied and used in the manner in question could not exceed 3*s*. per week or 7*l*. 16*s*. a year; and (*d*) that the gross values of 12*l*. and 10*l*. determined by the rating authority were therefore contrary to law.

It was contended for the rating authority and the assessment committee: (*a*) that the rent at which each of the cottages might reasonably be expected to let from year to year, if it could not be occupied and used otherwise than as it was, was not limited by the value at which it was to be reckoned as payment of wages in lieu of payment in cash; (*b*) that the sum of 3*s*. a week deductible from wages was not rent; (*c*) that, if either of the cottages were let to a person employed on the land in the service of the appellant farmer, the rent which could lawfully be charged would not be limited by the value at which it was to be reckoned as payment of wages in lieu of payment in cash; and (*d*) that, in considering the rent at which each of the cottages might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as it was, regard could be had to the rent which the appellant farmer himself would be willing to pay.

The question for the opinion of the court was whether or not on the facts stated the gross value of the two cottages, ascertained in accordance with s. 72 of the Local Government Act, 1929, was limited by the value at which they were to be reckoned as payment of wages in lieu of payment in cash under the relevant statutory provisions.

Harold Williams for the appellant farmer. *Williams* v. *Smith* (1) makes it clear that the occupier could not get for one of these cottages, while let to agricultural workers, more than 3*s*. a week. It is only through s. 72 of the Local Government Act, 1929, that any question arises as to the valuation for rating of the cottages. Two principles of law are involved: Where a statute directly prohibits the letting of a hereditament at more than a certain rent, that prohibition directly affects the rateable value: *Sculcoates Union* v. *Kingston-upon-Hull Dock Co.* (2). On the other hand, there is the principle, laid down in *Roberts* v. *Poplar Assessment Committee* (3), that

(1) [1934] 2 K. B. 158.

(2) [1895] A. C. 136.

(3) [1922] 2 A. C. 93.

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the limitation imposed by the Rent Restriction Acts on the letting of premises does not affect their rateable value. The rating authority here have valued the cottages on the basis that more could be got for them than the 3*s*. which is deductible.

[The dissenting judgment of Bankes L.J., in *Roberts* v. *Poplar Assessment Committee* (1) was referred to.]

The principle in *Roberts* v. *Poplar Assessment Committee* (2) is, it is submitted, not applicable to this case, first, because the tenant of a house within the Rent Restriction Acts is free to pay more in rent than the landlord can legally demand, whereas, since *Williams* v. *Smith* (3) that is not so in the case of a cottage used to accommodate an agricultural worker. Secondly, the Rent Restriction Acts have no reference to rates, whereas, in s. 72, the Local Government Act, 1929, expressly relates to rates the letting of cottages to agricultural workers. Thirdly, Lord Buckmaster said, in his opinion in *Roberts* v. *Poplar Assessment Committee* (4), that the value of the premises to the landlord was irrelevant for determination of the proper assessment. Here, however, not only the landlord is affected, but also the appellant farmer as tenant, and the value of premises to the tenant must, it is submitted, affect their rateable value.

Squibb for the rating authority and the assessment committee. Section 72 of the Act of 1929 does not limit the valuation for rating purposes of a cottage used for agricultural purposes to the amount which would be payable by an agricultural worker for that cottage. Secondly, if s. 72 does so limit that valuation, it does not limit it to the 3*s*. which is the most which can be obtained from the worker for the cottage under the Agricultural Wages (Regulations) Acts, 1924 and 1940.

Under s. 72 the rent has to be estimated at which the premises can reasonably be expected to let from year to year. An agricultural worker, as reference to para. (*b*) of s. 72 shows, is not a tenant from year to year. He cannot be such a tenant if his occupation of the house is conditional on his employment on the farm with which it is connected. The only person who will rent the house from year to year subject to the limitation on the way in which it is to be occupied is the farmer. The case stated finds that it is the appellant farmer who is the occupier of these cottages, and that they are not let to the workers who are living in them. It is the farmer who is the tenant from year to year. That will be so particularly where he rents a farm comprising cottages in its farm buildings. The core of the problem is to follow out the concluding words of s. 72 and find out what the cottage would let for subject to the restriction there specified. A farmer would pay more for an agricultural cottage than the 3*s*. maximum which he can get for it by deduction from wages, because it would be a great advantage to him to secure a house in which to accommodate a worker on his farm. The effect of s. 72 is to prevent an agricultural cottage from being rated as if it were an ordinary cottage. If the owner were free to let it as a week-end cottage, he would get a far higher rent for it. The section would have the effect of preventing the identical rateable value from being placed on two houses which were identical but one of which was restricted to occupation by agricultural workers. Section 72 merely directs the rating authority to have regard to the "restrictive covenant" whereby only a farm worker may occupy a given cottage.

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(1) [1922] 1 K. B. 25, 38.

(2) [1922] 2 A. C. 93.

(3) [1934] 2 K. B. 158.

(4) [1922] 2 A. C. 103.

It is submitted that if that argument be held wrong, the rateable value will still not be limited to the 3*s*. deductible for the cottages from wages. The agricultural legislation which fixes that maximum deduction has no more to do with rates than have the Rent Restriction Acts, so that the principle in *Roberts* v. *Poplar Assessment Committee* (1) applies as regards the 3*s*. Section 72 refers to the restriction on the use to be made of a house, but not to the limit of 3*s*. which comes from legislation having no reference to rating.

Harold Williams replying on the second point. Admittedly the legislation prescribing the maximum of 3*s*., looked at by itself, has, like the Rent Restriction Acts, no relation to rating; but s. 72 of the Act of 1929 gives an express direction that regard shall be had to rating in respect of buildings subject to that agricultural legislation. There is no such provision in relation to the Rent Restriction Acts, and so the principle in *Roberts* v. *Poplar Assessment Committee* (1) does not apply.

LORD GODDARD C.J. This case raises a question of considerable importance to farmers and rating authorities in

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(1) [1922] 2 A. C. 93.

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agricultural areas. It involves the construction of s. 72 of the Local Government Act, 1929, which deals with the rating of cottages used in connexion with a farm for the housing of agricultural workers. [His Lordship read the section, referred to the facts, and continued :] The contention of the farmer is that, in those circumstances, the gross value of the cottage could not be fixed at a higher sum than 6*l.*, because the effect of the section, so it was argued, was to make the 3*s.* a week the criterion of the rateable value. I think that that is a fair way of putting his argument, and it at first impressed me as right. The first fact stated in the case, however, is that, "the appellant is a farmer and occupies the two cottages for "the accommodation of agricultural workers employed by him "on his land. The cottages are not let to the agricultural "workers, who reside therein by virtue of their employ-"ment . . . ." They are, therefore, what are commonly called service tenants. They must, however, be regarded as in the position of licensees, because if they leave the farmer's employment they have to leave the cottages and can be ejected if they do not. Therefore, the person to whom the cottages are let, or who must be regarded as the person to whom they are let, is the farmer and not the agricultural labourers.

Mr. Squibb has argued, and has convinced me, that what this section requires is that agricultural cottages used as dwelling-houses for agricultural workers are, for the purposes of rating, to be treated as though they were let to the farmer subject to a restrictive covenant that he can only use them for the housing of workers on the farm. Once that is understood, it is evident that the value of the cottages for rating purposes is not necessarily to be limited to the 3*s.* fixed as representing the part of the wages which can be deducted in respect of their occupation. Whether it is deducted or not does not matter : the benefit which may be given to the agricultural worker in lieu of cash is the cottage, which benefit is assessed at 3*s.* a week. When it is borne in mind who is the tenant, who must be regarded as the tenant for rating purposes, namely, the farmer, it is clear that he might be ready and willing to pay a higher rent than 3*s.* a week for the cottage, although that would be the most that he could receive from his servant once he had put him into the cottage to live.

If, to take the example given by my brother Singleton during the argument, a farmer could only secure a certain good foreman if he could provide him with a cottage, he might well be willing to pay for such a cottage more than he would be able to deduct for it from the foreman's wages. Therefore, the construction which Mr. Squibb placed on the section is, in my opinion, right, and the true effect of it is that the gross value of the cottage is to be fixed by reference to the rent at which it would be expected to let subject to the restrictive covenant in question ; and, although the restrictive covenant on it is that it must only be let to a worker on the farm, and although, if it is so let, 3*s*. is the most that the farmer can obtain for it, it is obvious that the rent paid by the farmer may be greater than 3*s*. a week.

That is a matter which the assessment committee have to take into account, and, therefore, the answer to the question left to the court is in the negative. The assessment committee are not limited by that 3*s*. a week ; they can take into account the greater benefit which the farmer may be receiving through being the tenant of cottages in which he can accommodate his workers.

The real object of the section, as it seems to me, is that the farmer, who has, or who is to be regarded as having, cottages of this sort in which he actually houses his labourers, is not to have the cottages assessed as though they were in the open market, in which case they might be rented as week-end cottages by someone willing to pay a comparatively high rent of 50*l*. or 60*l*. a year. So long as the cottage is kept for an agricultural worker, that restriction is to be taken into account as diminishing the gross value which the cottage would otherwise bear.

The actual sum here is not for us to determine, as it has been agreed between the parties. The question being answered in the negative, the values of 12*l*. and 10*l*. gross and 7*l*. and 6*l*. net, will accordingly stand.

HUMPHREYS J. I am of the same opinion. My Lord has covered the whole ground, and I, therefore, need say nothing except that I agree.

SINGLETON J. I regard this as a difficult case. The Worcestershire Agricultural Wages Committee, in performing their duty under the Agricultural Wages (Regulation) Acts, 1924 and 1940, decided that the benefits or advantages which may be reckoned as payment of wages in lieu of payment in cash for the purpose of the application of any minimum-wage rate should be, in the case of a cottage, including any garden, 3*s*. a week, less any rent or rates which may be paid by the occupier.

My Lord has pointed out that for the purposes of this case we have to regard the farmer himself as the occupier of the cottages. The case so states. The cottages are not let to the agricultural workers ; the appellant farmer is the occupier for rating purposes.

[His Lordship read s. 72 of the Local Government Act, 1929, and continued :] Orders of the nature of this one made by the Worcestershire Agricultural Wages Committee have apparently existed since so long ago as 1924. It is important to notice that s. 72 of the Act of 1929 does not say any such thing as that the gross value of any hereditament so used and occupied shall be assessed at the figure of deduction allowable by the County Agricultural Wages Committee. The gross value for rating purposes " shall, so long as the house is so occupied and " used, be estimated by reference to the rent at which the house " might reasonably be expected to let from year to year if it " could not be occupied and used otherwise than as aforesaid."

The landlord, the occupier, for this purpose—the appellant farmer—can only make a deduction such as that allowed under the order of the Agricultural Wages Committee. In the one case he does not make any deduction ; in the other he makes a deduction of 3*s*. a week. Those are matters to be borne in mind ; and, indeed, under the decision in *Williams* v. *Smith* (1), if the farmer did let either of the cottages to the workers in them he could not charge more as rent than the 3*s*. a week which is deductible from their wages. It therefore seems to me that, the appellant farmer being the occupier, the gross value for rating purposes has to be assessed on the basis that he is the occupier and that the cottages are occupied and used within the meaning of s. 72 (*b*) of the Act of 1929 ; and that those who have to fix the gross value for rating purposes in a case like this must bear in mind that the farmer is the occupier, and that the value to him is limited by the fact that, so long as the cottage is used in that particular way, he, as occupier, can only deduct 3*s*. a week for it. Consequently the cottage is of much less value than it otherwise would be. Those who fix the gross value for rating purposes are not bound to fix it on the actual sum of 3*s*. a week ; but the fact that that sum is all that can be deducted by the farmer is one of the essential features which must be borne in mind.

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(1) [1934] 2 K. B. 158.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Ellis & Fairbairn.*

Solicitors for respondents: *Vizard, Oldham, Crowder & Cash, for Smith & Roberts, Evesham.*

BINNS *v.* WARDALE.

1946
May 7.

Lord Goddard C.J., Humphreys and Singleton JJ.

Shops—Sale of food—Sunday trading—Sale of bread—No "partial "exemption" order—"Meals or refreshments"—Shops (Sunday Trading Restrictions) Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 53), *s.* 1; *sch.* 1, *para.* 1 (*b*); *sch. II* (*a*).

A loaf of bread is a "refreshment" within the meaning of para. 1 (*b*) of sch. I to the Shops (Sunday Trading Restrictions) Act, 1936, and therefore it is not an offence under that Act to keep a shop open for the sale of bread on a Sunday.

CASE STATED by Recorder of Liverpool.

At a court of summary jurisdiction sitting at Liverpool on September 5, 1945, an information was preferred by George Binns, Chief Sanitary Inspector (hereinafter called the appellant) under the Shops (Sunday Trading Restrictions) Act, 1936, against John Wardale (hereinafter called the respondent) that on Sunday, June 24, 1945, the shop, 27 Hall Lane, Liverpool, of which the respondent was the occupier and in which he carried on a retail trade or business, was not closed for serving customers with bread. The stipendiary found the charge proved but dismissed the information on payment by the respondent of 4*s.* costs. The respondent appealed to quarter sessions, and on October 10, 1945, the recorder allowed the appeal, but at the request of the appellant stated a case for the opinion of the High Court.

The following facts were proved or admitted. The respondent carried on business at the above address in a working class district of Liverpool, supplying the residents of the neighbourhood with a multitude of articles, including foodstuffs. On

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Sunday, June 24, 1945, he sold to a small boy a two pound loaf of bread for human consumption off the premises. Subsequently he was interviewed by a Shops Act inspector, one Tighe, and when asked why the shop was not closed on the Sunday for the sale of bread he replied, after being cautioned, " I will tell you " the truth. I had some bread left on my hands and decided " to sell it, because we cannot sell it on a Monday, as it is stale." There was a notice in the shop to the effect that the shop was open on Sunday for the sale of sweets, minerals, tobacco and confectionery.

The recorder, being of opinion that the loaf of bread sold was a meal or refreshment within para. 1 (*b*) of sch. I. to the Shops (Sunday Trading Restrictions) Act, 1936, held that no offence had been committed and allowed the appeal. The appellant appealed.

Youds for appellant. Section 1 of the Act of 1936 (1), places an absolute prohibition on all Sunday opening of shops, subject to the proviso that shops may be open for the serving of customers for the purposes mentioned in sch. I. (1), which include " the sale of meals or refreshments," whether or not for consumption at the shop at which they are sold. By s. 2 (1), local authorities are empowered to make " partial exemption " orders, but no such order has been made in Liverpool. Schedule 2, which sets out the transactions in respect of which " partial exemption " orders may be made, includes the sale of bread and flour confectionery, including rolls and fancy bread. The statute distinguishes between bread and meals or refreshments and as the sale of bread on Sundays is one of those transactions which may be permitted by a "partial "exemption" order it follows that unless an order is made under s. 2, it is an offence to sell bread on Sunday. Bread is not a meal or a refreshment, but an item of food. What Parliament had in view when the Act was passed was the sale of the concomitants of a meal and not a single item of food. Refreshment signifies a light repast or drink on its own: see Oxford English Dictionary. A loaf of bread is not a meal.

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(1) Shops (Sunday Trading Restrictions) Act, 1936, s. 1: " Every shop shall, save as other- " wise provided by this Act, be " closed for the serving of cus- " tomers on Sunday: Provided " that a shop may be open for the " serving of customers on Sunday " —(*a*) for the purposes of any " transaction mentioned in the " First Schedule to this Act."

Section 2 enables " partial ex- " emption " orders to be made by local authorities.

By sch. I. " Transactions for the " purposes of which a shop may be " open for the serving of cus- " tomers on Sunday " include in para. 1 (*b*) " the sale of . . . . " meals or refreshments whether " or not for consumption at the " shop at which they are sold."

Schedule 2, which sets out the transactions in respect of which " partial exemption " orders may be made, reads: " The sale of— " (*a*) bread and flour confec- " tionery, including rolls and fancy " bread; (*b*) fish . . . . .; " (*c*) groceries . . . .; in so far as " such sales are not included " amongst the transactions men- " tioned in the First Schedule to " this Act."

[HUMPHREYS J. Supposing it were found that the boy went home and made a meal of the loaf would you say that an offence had been committed ?]

Not if those facts were proved, but they were not the facts of this case.

[HUMPHREYS J. We do not know what were the facts. Would it be sufficient to prove that the boy bought the loaf as a meal for the family ?]

In my submission it would not.

G. B. H. Currie for respondent. This was a criminal prosecution and the onus was on the prosecution of proving that an offence had been committed. A loaf of bread, from its very nature, falls within the definition of a meal or a refreshment. This shop was lawfully open and that being so persons might lawfully resort thereto and might, in my submission, request to be served with a loaf of bread. The second schedule of the Act does not limit, or exclude bread from, the provisions of the first schedule. In fact, bread being a meal or refreshment, the sale of it is included in the transactions sanctioned by the first schedule.

[LORD GODDARD C.J. If Parliament had intended that bread should not be sold on Sunday it could have said so.]

Yes, and the Act, this being a criminal matter, must be construed strictly.

LORD GODDARD C.J. This is a case stated by the recorder of the City of Liverpool, who quashed a conviction of the present respondent by the learned stipendiary of Liverpool for an offence against the Shops (Sunday Trading Restrictions) Act, 1936. The offence that was alleged against him was that on Sunday, June 24, 1945, he did not close his shop, 27 Hall Lane, Liverpool, for the sale of bread, but sold a two-pound loaf of bread to a customer. [His Lordship stated the facts as found in the case, and continued :] The recorder was of opinion (and this, I think it is fair to say, is a conclusion he has come to as a matter of law on the construction of the Act, and not in itself a finding of fact) that the loaf of bread was a meal or refreshment within para. 1 (*b*) of sch. I. to the Act, and held that no offence had been committed. First of all, it is necessary to look at the Act. [His Lordship read s. 1 and sch. I., and resumed :] So to sell a meal or refreshment, whether for consumption on or off the premises, is not prohibited by the Act ; and I do not think it could be contended that the meal or refreshment must be consumed by the person who buys. It is quite clear, it seems to me, that a person can send his servant to buy a meal or refreshment for him, bring it back to the house where the employer lives who may then consume the food. In the same way, if two or three people are going out for a ramble on a Sunday and one goes into a shop to buy refreshments for that ramble, obviously the consumption by all three or more of the people would be also permitted by the Act.

Section 2 of the Act deals with " partial exemption " orders. No such order has been made in this case. It is under sch. II. to this Act that the difficulty arises, because that schedule, which sets out the transactions in respect of which a partial exemption order may be made, is in these terms : " The sale of (*a*) bread " and flour confectionery, including rolls and fancy bread ; " (*b*) fish (including shell-fish) ; (*c*) groceries and other " provisions commonly sold in grocers' shops ; in so far as " such sales are not included amongst the transactions mentioned in the first schedule to this Act." It is said that if a shopkeeper sells a loaf of bread on Sunday he is committing an offence, because the sale of bread is one of those matters which may be permitted by a special " partial exemption " order, and that as Parliament has so provided, it follows that unless an order is made under s. 2, permitting the sale of bread, an offence is committed if bread is sold on Sunday ; and the Act, therefore, must be read as though it said that the keeping open of a shop on a Sunday and selling bread in that shop is in itself an offence. I think there would be a great deal of force in that argument if it were not for the words " in " so far as such sales are not included amongst the transactions " mentioned in the first schedule to this Act "—from which it follows that the sale of bread or flour confectionery, if sold for the purpose of a meal or refreshment, is not an offence. It is permitted by the Act because sch. II. only prohibits the sale in so far as the sale is not included amongst the transactions mentioned in the first schedule.

This Act came under the consideration of this court in the year 1939 in two cases which were heard together: *London County Council* v. *Lees* and *London County Council* v. *Iafrate* (1). In those cases, apparently, neither of the respondents kept cafés or restaurants. They kept shops at which such things as cream buns, chocolate eclairs, veal and ham pies, Swiss rolls, and so forth, were sold. It was admitted that those articles, or at any rate, some of them, were flour confectionery. The court in those cases pointed out (and, indeed, the very eminent counsel who argued the cases for the London County Council agreed) that, taking the provisions of those two schedules together, and comparing and contrasting them with each other, they were unintelligible—and for this reason, that although the sale of flour confectionery is dealt with expressly in sch. II., as that schedule says that those sales are not to be affected by it if they are included amongst the transactions mentioned in the sch. I., and as these things were sold as refreshments and the sale was permitted, you could not say that it was permitted under the sch. I. of the Act and prohibited under sch. II., because that makes nonsense. Therefore, said the court, as I understand the decision, " We are not going to hold that a " man is to be convicted of an offence under this Act when in " one schedule it says that he may do a thing, whereas on the " particular construction you ask us to put on the other " schedule he is not entitled to do any such thing."

In spite of the very excellent argument to which we have listened on behalf of the appellant in this case—and Mr. Youds has put forward everything which could be said in a most attractive way—although it would be straining language to say that, a loaf of bread must constitute a meal (in certain circumstances it obviously may), I cannot understand how it can be said that a loaf of bread, sold for human consumption, is not a loaf of bread sold for refreshment. "Refreshment" is not a term of art. When one talks about a person taking " refreshments " one means taking some article of food generally different from what I may call a full meal—something light—a refresher. Bread is a refreshment just as much as a bun or a ham sandwich is a refreshment. It may not be so attractive, but it is a refreshment and part of a meal. That, I think, must be conceded. Therefore, you have the position that under sch. I.

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to this Act bread can be sold as a refreshment. Therefore, to say that, unless there is a partial exemption order, bread cannot be sold because of the provisions of sch. II. creates in my mind a very formidable difficulty. With the greatest respect, I think one may say it is possible that Parliament did not appreciate that by inserting the concluding words "in so far as such "sales are not included amongst the transactions mentioned in "the first schedule to this Act," the provisions of the Act with regard to the matters which are mentioned in sch. I., were being very largely, if not entirely, stultified. To repeat the instance which I ventured to give during the argument, one of the provisions most commonly sold in grocers' shops is cooked meat. I cannot appreciate how anyone can argue that the sale of cooked meat is not the sale of a refreshment. I should think, indeed, that in very many cases it is the sale of a meal. Many people are content with a meal of cold meat. If, therefore, cold meat or cooked bacon can be sold in a shop—and it clearly can be sold under the provisions of sch. I.—it seems to me the provisions of sch. II. do not make it an offence if it is sold on Sunday. So, too, I think, with the case of bread. No doubt, in the ordinary way, a person does not buy dry bread as a refreshment; but at the present time I can understand that there may be many occasions on which a person would be only too thankful, on a railway journey, or somewhere where he can get no other food at all, to buy a roll, which, perhaps, with a glass of water, may be the only sustenance he or she can get upon a long journey. But in any circumstances bread must be, it seems to me, a refreshment, and if Parliament meant to say "you may sell bread by the slice but not sell it by the loaf," it would have said so. I think exactly the same difficulty arises in this case as arose in *London County Council* v. *Lees* (1). I am certainly not prepared to say the recorder was wrong. In fact, in the circumstances, I think I should have held in the same way myself. My difficulty, as I have said, is created by the concluding words of sch. II. If difficulties are created in this way, and if decisions of this court are not in accordance with what Parliament intended, Parliament can and no doubt will put it right.

For the reasons which I have endeavoured to give, in my opinion this appeal fails and must be dismissed.

HUMPHREYS J. I am of the same opinion, and I desire to associate myself with some observations which fell from my

(1) [1939] 1 All E. R. 191.

Lord in the course of the argument, when he observed that he was very much averse to the notion that any person should be convicted in this country on the terms of an Act of Parliament which was obscure and which lawyers could not construe clearly. If an Act of Parliament is so drawn as to make it really difficult to say what the legislature intended and what facts come within it, the benefit of that obscurity should be given to the accused person. I have tried to see what it was that Parliament was really intending and desiring to do in the passing of this Act, which was not the first Act, by a great many, which had been passed with a view to restricting Sunday trading. I find that Parliament starts by declaring that " Every shop " shall . . . . be closed for the serving of customers on " Sunday." Then it was thought necessary to make exceptions to that. What are the exceptions and why are they made ?

I have found it quite impossible to arrive at any conclusion as to what was in the mind of those who put in this list of exceptions, unless it amounts to this (I am not saying I think it does, but it possibly may) that wherever you can think of anything which people are likely to want on Sunday, then a shop may be kept open for that purpose. So you find excepted things which are not in the least necessary, which can never be necessary, but which are the sort of things which the ordinary person may desire to purchase on Sunday, although he could purchase them all perfectly easily on another day. They are such things as—I will leave out intoxicating liquors. There may be a special reason there, because Sunday trading is dealt with in the Licensing Act—sweets, chocolate, ice-cream. Why should people be particularly allowed to buy sweets and ice-creams on Sundays if all shops are to be closed on Sunday ? I do not know. What is the necessity for a flower shop to be open on Sunday ? It is very pleasant for some people to be able to buy flowers on Sundays, but nobody can say it is necessary. Fruit and vegetables are things which you eat and one can understand it in that case. Then you get aircraft, motor or cycle supplies or accessories. I can only imagine that that is to help the broken-down motorist or even possibly the person who is travelling by air, but it is a little unlikely that a person who is travelling by air, and has found it necessary to make a forced landing, would go to the sort of shop which would be open on Sunday in order to get what was necessary to make his aircraft airworthy. Then, tobacco and smokers' requisites. No doubt it is a convenience for a great many people to be able to buy tobacco on Sunday. Then, newspapers, books and stationery and so forth; guide books, postcards, photographs, reproductions, photographic films and plates and souvenirs. For some reason or other people may open their shops on Sunday in order to sell all these things.

We are dealing here with bread. Is bread forbidden? Certainly not. Not only is the sale of bread not forbidden on Sunday, but it is expressly allowed, because one of the things which is specifically allowed is any meal. Therefore, if a person goes into a shop and says, "I want some beef and "vegetables and bread and butter and cheese," if the shopkeeper has those things with which to supply him there is no question at all that the shopkeeper may sell him bread, because it is part of a meal; it is not the whole meal, but part of it, and the customer is entitled to buy a meal, including bread.

The next word is "refreshments." I respectfully agree with my Lord. I think the word "refreshments" is really equivalent in this statute, as I think it is in ordinary parlance, to a light meal—something less than a solid meal. What article of food is there which is more appropriately described as "refresh-"ment" than something made of flour, something in the nature of bread—it may be a bun or, perhaps, a cake—but bread? It is, it seems to me, quite impossible to say that bread does not come within the ordinary term "refreshments," which are specifically allowed to be sold on Sunday, and, not only if they are to be consumed on the premises. They may be taken off the premises. If, therefore, the hypothetical person is one who does not want to eat his meal at the shop, he may buy his meal at the shop and take it home, and one of the things he most assuredly may do is buy his bread, whether or not he buys something else, in order that he may eat that meal at home. If that be so, the difficulty here is created, it seems to me, by those last words in sch. II. because that schedule, which deals with the making of a partial exemption order, says that it may be made in respect of bread. If the matter rested there, I agree that a strong argument might be put up to the effect that the sale of bread on Sunday must be illegal (unless as a meal or refreshment) prima facie because a partial exemption order may be made in order to enable the sale of bread on Sunday. But then there are those words—which I do not want to spend time in further considering because my Lord has dealt with the matter fully and I agree with every word he has said—"in so "far as such sales are not included among the transactions

" mentioned in the first schedule to this Act." So that one goes back again and sees that the sale of bread is apparently forbidden because it is only allowed under a partial exemption order, if made. But look at sch. I. If bread is part of a meal or refreshment then it is permitted. It is those words, as I understand it, which caused eminent counsel in *London County Council* v. *Lees* (1) to say, and almost caused Lord Hewart C.J. to say (he went very near saying it) that the two schedules are self contradictory. The view taken by the court in that case was one which I myself had taken earlier—not on quite the same words but dealing with an Act which contained somewhat similar words—in *The London County Council* v. *Davis* (2). In that case Branson J. and du Parcq J. (as he then was) had come to the conclusion that newly-baked bread came within the words " newly-cooked provisions " in an Act of 1928. I myself had very great difficulty in arriving at that conclusion for the reason which I then gave (and I see no reason to withdraw it) that I did not think any ordinary person would ever talk about " newly cooked bread," and in all the Acts of Parliament that I was at that time able to find the expression was never used. Nobody taks about " cooking " bread; it is always " baked "—" newly-baked bread."

I said then, and I say now, that where the matter is as doubtful as that, and certainly where other members of the court take a different view, I was not prepared to say in a criminal case that the magistrate who had acquitted the particular person charged before him was wrong. That was the view taken by this court in *London County Council* v. *Lees* (1), where Lord Hewart C.J. (whose decision was agreed with by Singleton J., as well as by Charles J.), said he was not prepared to differ from the view of the magistrate who had held that no offence was committed. I take the same view in this case. I do not put my judgment higher than this: it seems to me quite obvious that bread may be sold on Sunday in a shop in certain circumstances which are, I think, indistinguishable from the circumstances in this case. What Parliament meant exactly, if it meant anything, by those concluding words of sch. II. I do not profess to know or to understand. But in this case the tribunal which has stated this case for our consideration has come to the conclusion that the most reasonable view to take of the matter is that the person who sold bread on a Sunday to a boy for human consumption had sold it either as a meal or

(1) [1939] 1 All E. R. 191. (2) [1938] 2 All E. R. 764.

as refreshment. I come to the conclusion that the learned recorder was quite justified in taking that view, and, this being a criminal case, I decline to say I differ from him.

SINGLETON J. While appreciating the arguments which have been addressed to the court, I am bound to say that I regard this as a case which it is very much easier to argue than to decide. That often occurs. There are many difficulties in the Act which give scope to the argument of counsel but which present difficulty in giving a judgment at all. The learned recorder found in para. 12 of the case stated by him: "I, being "of opinion that the loaf of bread sold was a meal or refresh-"ment within para. 1 (*b*) of the first schedule to the Act, held "that no offence had been committed." That may be a statement of opinion; it may be, to some extent, fact. Indeed, in *London County Council* v. *Lees* (1), to which reference has been made by my Lord, Lord Hewart C.J., said, speaking of the facts in that case: "I will only add that among the many "doubts which this case and this legislation present to my "mind is the doubt whether we are really dealing here with a "question of law at all, or whether, on the true construction—"if there is a true construction—of this statute, that with "which the magistrate was coming to terms was a pure "question of fact." I confess I have some doubt in my mind as to what the facts found by the learned recorder were. He did not hear any evidence on behalf of the respondent; he did hear the evidence of the inspector.

Speaking for myself, and assuming I had not any authority before me, I should be very much inclined to come to the conclusion that on that Sunday morning the respondent's shop was not closed for the serving of customers. But there are certain difficulties. The case of *London County Council* v. *Lees* (1) was before this court in January, 1939. The facts were different, and, I can see that there may well be a difference between the sale of two éclairs or a Swiss roll and the sale of a loaf of bread. Be that so or not, it may be, to a certain extent at least, that the case of *Lees* (1) covers this case. But, on the whole, I am not satisfied that it does. I should have felt very considerable difficulty on this matter apart from that case and apart from the view which has been expressed by my Lord and by Humphreys J.; but I take cover, if I may use such an expression, in that which

(1) [1939] 1 All E. R. 191.

was said in the case of *Lees* (1) by Lord Hewart C.J.: "Not "often in the course of half a century of experience of the law "have I had the opportunity of endeavouring to come to close "quarters with such a piece of legislation. Sir William Jowitt, "appearing on one side in this case, frankly admitted that the "provisions of these two schedules, taken together, and com-"pared and contrasted with each other, were, to his mind, "unintelligible." I confess I do not find them easy to interpret. This court expressed an opinion about them several years ago, and the fact that all the members of this court have again expressed an opinion upon them may lead Parliament to think that it is quite time that legislation of this kind was made a little clearer than it is. That thought encourages me to say that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Cree & Son, for W. H. Baines, Town Clerk, Liverpool.*

Solicitors for respondent: *Lester Davidson, Liverpool.*

(1) (1939) 1 All E. R. 191.

A. W. G.

WOOLLEY v. ALLEN FAIRHEAD & SONS, LIMITED.

1946
Mar. 13, 14, 15.
Atkinson J.

Emergency legislation—Master and servant—Essential work—Week's notice to leave employment—Consent of national service officer given after expiration of notice—Appeal by employee—Reinstatement—Claim for wages up to time of reinstatement—Employment continuous—Statutory duty to pay normal wages—Essential Work (Building and Civil Engineering) (No. 2) Order, 1941 (*St. R. & O.* 1941, *No.* 2067).

The plaintiff, a "specified person" under the Essential Work (Building and Engineering) (No. 2) Order, 1941, was employed by the defendants in a scheduled undertaking, under that order, when they gave him a week's notice to terminate his employment and the plaintiff stopped work. Ten days after the expiration of the notice, the national service officer gave to the defendants permission in writing to terminate the plaintiff's employment. On appeal to the local appeal board, the plaintiff succeeded and the defendants were ordered to reinstate the plaintiff in his employment and he was reinstated:—

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Held, that, since the permission of the national service officer to determine the plaintiff's employment, not being retrospective, was ineffective, the plaintiff's contract of employment had never ceased. The order providing that during his contract of employment the plaintiff must be paid not less than his normal wages, this provision constituted a statutory duty which could not be repudiated by the defendants. Accordingly, the plaintiff was entitled, not merely to a week's wages in lieu of notice, but to his normal wages from the date of dismissal to that of his reinstatement.

ACTION.

The plaintiff, a foreman carpenter and a "specified person" under the Essential Work (Building and Civil Engineering) (No. 2) Order, 1941 (1), was employed by the defendants in a scheduled undertaking under that order and had been employed by them for sixteen of the twenty years before March 2, 1942, when he was orally informed by the defendants that he had disobeyed orders and given a week's notice by them to terminate his employment, ending on March 9. On Friday night, March 6, according to the plaintiff's evidence, which the judge accepted, the plaintiff saw the defendants' cashier at Swindon and asked if he could be paid up to the Friday (and not, as usually, up to the Thursday) night and have Saturday morning off, in order that he might see the national service officer before he returned to his home at Barnet. He was paid up to the Friday night and was handed his insurance cards. On Saturday morning, March 7, the plaintiff saw the national service officer, who said to him : " You go home." On March 19, permission in writing was given to the defendants by the officer to terminate the plaintiff's employment on the ground that he was "apparently redundant." The plaintiff lodged his notice of appeal on March 27 and the local appeal board found in his favour. On July 7, 1942, the defendants were ordered to reinstate the plaintiff and he was reinstated. The plaintiff now claimed his normal wages from the time of his dismissal to that of his reinstatement.

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(1) By clause 4 (1) of the Essential Work (Building and Civil Engineering) (No. 2) Order, 1941 :—" Subject as hereinafter " provided, where a person carries " on a scheduled undertaking the " following provisions shall " apply :—(*a*) the person carrying on the undertaking shall not " terminate (except for serious " misconduct) the employment in " the undertaking of any specified " person . . . . except with the " permission in writing of a " national service officer ; (*b*) a " specified person shall not leave " his employment in the undertaking except with such per" mission as aforesaid ; (*c*) not less " than one week's notice of the " termination of the employment " in the undertaking of a specified " person shall be given by that " person or by the person carrying " on the undertaking . . . . so, " however, that this provision " shall not apply where the " specified person is dismissed for " serious misconduct."

Paragraph (*d*) deals with the conditions in which " the person " carrying on the undertaking " shall in respect of every pre" scribed period pay to every " specified person a sum which is " not less than the normal wage " for the prescribed period."

J. M. Shaw for plaintiff. The plaintiff was not dismissed for misconduct. The notice, therefore, to determine the plaintiff's employment given on March 2 was bad, since it was given without the permission of the national service officer. The plaintiff's contract of employment never terminated, but continued until his reinstatement. *George* v. *Mitchell and King, Ld.* (1). The plaintiff, therefore, is entitled to his wages from the date of his discharge to that of his reinstatement. Alternatively, the plaintiff's claim is for breach of statutory duty imposed by cl. 4 (1.) (*a*) of the Order of 1941.

Garland for defendants. On March 19 permission in writing was given by the national service officer to the defendants to terminate the plaintiff's employment. That permission was given with reference to the notice given by the defendants to the plaintiff on March 2, of which the officer had knowledge, and was retrospective. The plaintiff was not entitled to any wages from March 9 to the date of his reinstatement. *Docker* v. *Standard Telephones & Cables, Ld.* (2). If the permission in writing of the national service officer was not retrospective and the notice to terminate the plaintiff's employment on March 9 was not justified, since the Order of 1941 was grafted on to the position of the parties at common law, the plaintiff is only entitled to one week's wages from March 9 to March 18, in lieu of notice.

J. M. Shaw replied.

ATKINSON J. (having found that the plaintiff was not guilty of any misconduct and had not failed in any duty) : The Essential Work (Building and Civil Engineering, No. 2) Order, 1941, as I understand the decision of *George* v. *Mitchell and King, Ld.*(1) in the Court of Appeal did not displace any existing

(1) (1943) 59 T. L. R. 153. (2) [1943] K. B. 92.

contract of employment, but it added certain statutory terms in the case of a scheduled undertaking to the contract of employment of a specified person (see cl. 4): the persons carrying on an undertaking are not to terminate the employment of any specified person, except in the case of serious misconduct, without the permission in writing of the national service officer; not less than one week's notice of the termination of the employment must be given; and during the contract of employment a specified person, under the conditions laid down, must be paid not less than the normal wage, as defined. It is clear that the notice to terminate the plaintiff's employment was given without the permission in writing of the national service officer. Apparently, in practice, that is done and according to Mr. Carter, the defendant's manager, if the permission is given before the expiration of the notice that is deemed to be sufficient. It is not necessary to decide whether that is so. Mr. Carter's view may be right because by cl. 4 (1.) (*a*) of the order of 1941, "the person carrying on the undertaking "shall not terminate (except for serious misconduct) the "employment in the undertaking of any specified person . . . . "except with the permission in writing of a national service "officer." The notice does not, but the expiration of the notice does actually terminate the employment. Were the issue material, I should not interpret the clause in that way, since the seven day's notice is given to a workman to give him that time to look for other work, but if, when notice is given him to terminate his employment, he has no idea whether the notice will be effective and will not know until the consent of the national service officer reaches him, perhaps on the day of the expiration of the notice, he will not have the same opportunity to look for fresh work.

In this case, the permission of the national service officer in writing was not give until March 19 some ten days after the expiration of the notice. To a charge against the employers of dismissing the plaintiff without the consent of the national service officer, made before March 19, I cannot see that the employers could have had any defence and that seems to me to be an answer to Mr. Garland's first point that on March 19, when the consent of the national service officer was given in writing, that consent had retrospective effect and made the notice to terminate the plaintiff's employment given on March 2 a good notice. At all events, on the expiration of the notice, the breach by the employers of the terms of cl. 4 (1.) (*a*) of the order was complete and the workman then had a right of action by reason of that breach. See *George* v. *Mitchell and King, Ld.* (1). In that case the permission of the national service officer had been asked and had been refused: in this case the plaintiff was dismissed without the permission of that officer, but this case is as much a breach of the order as was the other. MacKinnon L.J. said in *George* v. *Mitchell and King, Ld.* (2): "By art. 4 the defendants "were forbidden to terminate the plaintiff's contract of "employment except with the consent of a national service "officer, which was refused. Therefore, the notice the defendants gave to the plaintiff was ineffective and his contract "of employment continued." If that be so, when permission is refused, it is just as true when permission is not obtained. The plaintiff's contract of employment, therefore continued. If on obtaining the permission of the national service officer the employers had then given to the plaintiff a fresh notice to terminate his employment, that would have been a good notice and, on its expiration, the plaintiff's contract of employment would have terminated and the measure of the employers' liability would have been the amount of about three weeks' wages. But this the employers did not do and the plaintiff's contract of employment with his employers continued.

Mr. Garland has also contended that when permission to terminate the employment had been given by the national service officer the employers were in the same position as if the order of 1941 had not been made. They had an ordinary contract of employment with the plaintiff which provided for a week's notice and they had refused to employ him, without giving him proper notice, but their measure of liability was only a week's wages in lieu of notice. It is an attractive argument, but I do not think that it is sound, because under the terms of the order of 1941 there was a statutory duty on the employers, during the employment to pay the plaintiff a sum not less than his normal wage. This provision is not on the same level as the term of a contract and a statutory duty cannot be repudiated. Mr. Garland's contention fails and the plaintiff is by the terms of this order entitled to be paid his wages until the termination of his contract. The contract of employment never did terminate and he resumed his actual employment on reinstatement. He is entitled, therefore, to his normal wages

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(1) 59 T. L. R. 153. (2) Ibid. 156.

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from the time of his dismissal to that of his reinstatement and judgment will be entered for him for 74*l*. 16*s*. 0*d*.

Judgment for plaintiff.

Solicitors for plaintiff: *Neil Maclean & Co.*
Solicitor for defendants: *R. L. Mason.*

C. G. M.

C. A.

1946
April 12.

Lord Greene M.R., Morton and Somervell L.JJ.

WINTER *v.* WINTER.

National savings certificates—Dispute as to ownership between rival claimants—County court proceedings—Postmaster-General not a party—Jurisdiction—Whether claim referable to Chief Registrar of Friendly Societies—Savings Certificates Regulations, 1933 (*St. R. & O.*, 1933, 1149), *reg.* 27.

The Savings Certificates Regulations, 1933, reg. 27 provides: "(1.) If any dispute arises between the Postmaster-General and "the holder of any certificate or any person claiming to be "entitled to or be interested in any certificate, the matter in "dispute shall be referred in writing to the Chief Registrar of "Friendly Societies."

"(3.) The award of the Chief Registrar on any reference under this "regulation shall be final and binding on all parties . . . .":—

Held (reversing the county court judge) that in any dispute between a claimant to certificates and the holder thereof to which the Postmaster-General is not a party, reg. 27 does not apply and the courts are not therefore deprived of their jurisdiction to decide the matter in dispute.

Bailey v. *Bailey* [1926] Ch. 758 distinguished.

Lewis v. *Paulton* (1907) 14 Sc. L. T. 818 doubted.

APPEAL from Bloomsbury county court.

The applicant and the respondent were husband and wife but they were living apart. There were standing in the wife's name 500 units of National Savings Certificates which the husband claimed as having been bought and paid for by him and therefore belonging to him.

He therefore brought proceedings in the county court under the Married Women's Property Act, 1882, for an order that the wife should transfer them into his name. For the wife the objection was taken that the court had no jurisdiction to try the matter on the ground that by reg. 27 of the Savings

Certificates Regulations, 1933, any dispute between rival claimants to certificates must be determined by the Chief Registrar of Friendly Societies.

The deputy county court judge said it was argued that reg. 27 was in all material respects the same as s. 14 of the Savings Banks Act, 1844, by which any dispute "between the trustees and managers of any savings bank and "any individual depositor therein . . . . or any person "claiming . . . . to be entitled to any money deposited in "such savings bank" was to be referred in writing to the barrister-at-law specified. By the Savings Banks (Barrister) Act, 1876, and a Treasury Order, dated December 12, 1924, the powers and duties of the barrister were transferred to the Registrar of Friendly Societies. The above provisions were considered and construed by the Court of Appeal in *Bailey* v. *Bailey* (1) in relation to rival claims of depositors and it was held that the Registrar of Friendly Societies had jurisdiction over such disputes. It seemed to him that reg. 27 was so nearly the same in language as s. 14 of the Savings Banks Act, 1844, that he must construe it in accordance with *Bailey* v. *Bailey* (1) and dismiss the application. The husband appealed.

Sir Hubert Houldsworth K.C. and *Petrie* for the husband. Savings certificates first came into existence under the War Loan (Supplementary Provisions) Act, 1915, which by s. 1 established the post office register for small certificates and by s. 5 gave power to make regulations, a power extended by s. 33 of the Finance Act, 1923, under which the Savings Certificates Regulations, 1933, were made. Regulation 27 which is here in question can only on a natural view of its construction be applied to disputes between the Postmaster-General and the holder of a certificate or the Postmaster-General and a claimant of a certificate. Reliance for a different construction is placed on *Bailey* v. *Bailey* (1). That was a case under the Savings Banks Act, 1844 (as amended by the Savings Banks (Barrister) Act, 1876 and a Treasury Order made in December, 1924), and a dispute having arisen between a brother and sister as to the ownership of a savings bank deposit, it was held that the Registrar of Friendly Societies alone had jurisdiction to decide it. Admittedly the language of reg. 27 is very similar to that in the Savings Banks Act, 1844, s. 14. But the regulation ought not to be interpreted in the same way for the ambit of the

(1) [1926] Ch. 758.

regulations is not so wide. It does not apply to a dispute in which the Postmaster-General is not a party and the courts therefore have jurisdiction to deal with the present case.

Even if this were not so on the construction of the regulation, the courts would have a concurrent jurisdiction under the Married Women's Property Act, 1882. [They were stopped.]

Astell Burt for the wife.

[LORD GREENE M.R. Will you deal only with the construction of reg. 27.]

That regulation follows the form of enactments going back to 1844 and earlier, and the construction always placed on the particular form of words is that they apply to disputes (*a*) between a claimant and the authority, and (*b*) to disputes between claimants in the absence of the authority. Under these provisions the Chief Registrar of Friendly Societies has built up a jurisdiction extending back over many years, which ought not to be disturbed: see a statement in Halsbury's Statutes, vol. 17, p. 653. Even if that is not the natural construction of reg. 27—and it is contended that it is—the court must apply *Bailey* v. *Bailey* (1). [LORD GREENE M.R. That case seems only to have decided that the Chief Registrar has jurisdiction to decide between rival claimants when the authority is also involved.] The decision goes further and establishes the Chief Registrar's jurisdiction under a section similar in language to reg. 27 to decide between rival claimants only; and that jurisdiction is exclusive: see *Crisp* v. *Bunbury* (2). So far as material the language of reg. 27 and s. 14 of the Act of 1844 is identical and *Bailey* v. *Bailey* (1) is directly applicable. That decision receives support from *Lewis* v. *Paulton* (3).

Sir Hubert Houldsworth K.C. replied.

Cur. adv. vult.

April 12. SOMERVELL L.J. read the judgment of the court: The appellant made an application in the Bloomsbury county court for a declaration that 500 units of National Savings Certificates, standing in the name of his wife, were his property and for an order that his wife, the respondent in the county court, and before us, should transfer them into his name. The wife took a preliminary point that the county court had no jurisdiction. The learned deputy county court judge held that he had no jurisdiction, and this appeal is brought against his

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(1) [1926] Ch. 758.
(2) (1832) 8 Bing. 394.
(3) (1907) 14 Sc. L. T. 818.

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order. The merits were not investigated, but it is admitted that apart from the objection, the application was in proper form under the Married Women's Property Act, 1882.

The objection to the jurisdiction was based on reg. 27 (1.) of the Savings Certificate Regulations, 1933. These regulations were made under s. 33 of the Finance Act, 1923, which extended the regulation-making power conferred by s. 5 of the War Loan (Supplemental Provisions) Act, 1915, as amended to the making of regulations covering inter alia the savings certificates in question in this appeal. The operative words are "The Treasury may make regulations as to the manner in "which and the conditions under which the money may be "raised." [His Lordship read reg. 27 (1.) and continued:] It was said that these words apply to the present dispute and confer exclusive jurisdiction on the Registrar of Friendly Societies. Sir Hubert Houldsworth for the husband submitted (1.) that the words did not apply to the proceedings before the county court in this case, and (2.) alternatively, if they did apply, the jurisdiction was concurrent and not exclusive. After hearing his argument on the first point we called on Mr. Astell Burt and having come to the conclusion that the regulation did not apply to these proceedings we did not hear argument on the alternative submission. Mr. Astell Burt contended that the words of the regulation expressly covered a dispute between "the holder of any certificate" and "any "person claiming to be entitled to or interested in any certi-"ficate." We agree that if this were the construction, it would apply in this case, but it is in our view impossible so to construe it. A provision covering a dispute between A. and B. or C. does not expressly cover a dispute between B. and C. There must be a dispute to which A. is a party. For the proposition that the jurisdiction if it existed was exclusive he relied on *Crisp* v. *Bunbury* (1), where the provision, though differently worded, was, he submitted, the same in effect so far as this point was concerned. He then argued that the position of the Postmaster-General in relation to savings certificates brought about the result for which he contended and that this was laid down in a decision of this court in *Bailey* v. *Bailey* (2). Under reg. 11 of the regulations the Postmaster-General keeps a record of holders of savings certificates and effects transfers by causing the name of the transferee to be recorded as holder. In *Bailey* v. *Bailey* (2) the

(1) 8 Bing. 394.

(2) [1926] Ch. 758.

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plaintiff alleged in the statement of claim that she kept house for her father, who had died intestate. She had deposited in the Post Office Savings Bank savings from sums which her father had given her for her services. These sums were claimed by the defendant, a son of the deceased, to whom letters of administration had been granted, as part of his father's estate. The court decided that on the facts as alleged in the pleadings the dispute was within the jurisdiction of the Registrar-General of Friendly Societies under the relevant provisions of the various Acts. The decision is one which we should be reluctant to extend to the statutes and regulations with which we are concerned dealing with National Savings Certificates. Mr. Astell Burt argued that the legal effect on the question of the jurisdiction conferred was the same as in the present case. Assuming that this is so, we do not think the decision covers the present case. When the case is carefully examined it does not, in our view, justify the unqualified statement in the headnote " that a dispute between a depositor and a person claiming " adversely to him was a dispute " within the meaning of the relevant statutory provisions conferring jurisdiction on the registrar. The case was argued on the pleadings as a preliminary point of law. In order to see what was decided it is necessary to consider how the facts as pleaded were understood by the court. This appears most clearly from the judgment of Warrington L.J. He says (1): " The plaintiff in this case " deposited with the Post Office Savings Bank considerable " sums of money; in the year 1920 she deposited a sum of 100*l.*, " and in three months of the year 1924 she deposited sums " amounting altogether to 300*l.* The defendant is the adminis- " trator of the deceased father of himself and the plaintiff, and " as such he claimed that at all events the 300*l.* deposited by " the plaintiff after the death of their father formed part of the " father's estate. He applied to the Post Office for payment of " the sums so deposited, and his demand was refused. " Ultimately the matter was referred to the Registrar of " Friendly Societies appointed under the Friendly Societies " Act of 1875, who made an award in favour of the claimant, " and ordered that something over the 300*l.* part of the total " deposited I suppose the 300*l.* with interest—should be paid " out to the father's administrator, the claimant. The plaintiff " has brought this action, alleging that the award of the Regis- " trar of Friendly Societies was made without jurisdiction and

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(1) [1926] Ch. 769.

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" was therefore, void and the question so raised has, by an " order made in chambers, been directed to be heard as a " question of law preliminary to the trial of the action." The plaintiff in fact received notice from the registrar of the proceedings before him but did not attend. Then Warrington L.J. said (1) : " Then it is said that here there is no dispute between " the bank and the outsider. With all respect to the learned " judge who has expressed a contrary opinion, I cannot conceive " where a dispute arises unless this be a dispute. The claimant " calls upon the bank to transfer the money to him and the " bank says : ' No, I will not transfer the money to you. " ' I will help you to some extent, because I will put a stop on it, " ' but I will not transfer the money to you, because I may " ' afterwards have to pay it to the depositor.' The claimant " repeats : ' I am entitled to that money and ought to have " ' it transferred to me.' It seems to me there is plainly a " dispute there, a dispute between the bank and the claimant." Then Sargant L.J. at the end of his judgment says (2) : " If the " matter had come before us in the shape in which it came " before Russell J. I should have seen no reason for altering or " varying his order, but as it is, and applying my mind to a " question different from that which was before him, I feel " satisfied that the words of s. 14 of the Act of 1844 are sufficiently wide to enable the registrar, who has now been " substituted for the barrister, to decide a claim not only as " between the bank and a depositor, or person claiming " through or under the depositor, but also as between the bank " and the depositor and persons claiming by title adverse to the " depositor." It seems therefore clear to us that those two members of the court based their decision on the existence of an actual dispute between the bank and the defendant. The decision therefore comes to this. The jurisdiction of the registrar to decide a dispute between the bank and " a person claiming to " be entitled to the money "—to take the words from the statutory provision—exists, although the attitude taken up by the bank is the result of a dispute between the person claiming to be entitled and the individual depositor. Further, that the dispute having arisen between the bank and the defendant, the registrar was entitled, having served notice of the proceedings on the plaintiff, to adjudicate on the issue as between plaintiff and defendant and finally to determine that issue by his award. We have difficulty in following the reason-

(1) [1926] Ch. 772.

(2) Ibid. 758, 775.

ing upon which this latter conclusion was based, but we should have felt bound to follow the decision in *Bailey* v. *Bailey* (1), if there were no good grounds for distinguishing it from the present case.

Sir Hubert Houldsworth sought to draw a distinction between the present case and that case, based on the fact that the Postmaster-General has merely administrative functions in regard to savings certificates. It is, in our view, unnecessary to consider this point. In our opinion the decision in *Bailey* v. *Bailey* (1) does not apply to the present case, where no dispute has arisen with the Postmaster-General. Nor on the issues raised in the plaint is any dispute inevitable or likely. There being no dispute with the Postmaster-General, we have already stated our opinion that the words of the regulations do not apply.

We were referred to the case of *Lewis* v. *Paulton* (2). In that case the complainer, who was executrix of the deceased, sought against (1.) creditors of the deceased, (2.) the Registrar of Friendly Societies, (3.) the Postmaster-General suspension of and interdict against arbitration proceedings taken or threatened by the respondents under the Post Office Savings Banks Acts to determine whether a sum deposited in the Post Office Savings Bank by the deceased was payable to her as executrix or to the creditors. The Lord Ordinary held that the question at issue involved a dispute falling to be decided by the arbitration proceedings as laid down in the provisions of the Act. The provisions were similar to those in *Bailey* v. *Bailey* (1). The judgment was on the basis that the Postmaster-General had no interest in the merits of the dispute. The complainer had never claimed the money from the Postmaster-General and if the respondent creditors or any of them had made such a claim the Lord Ordinary does not rely on this. He says, " At the present moment the Postmaster-General " is in the position of refusing to pay the sum deposited with " him at Campbeltown to either of the parties claiming it." That case is not binding upon us and we doubt whether the Lord Ordinary is right when he says that not to give exclusive jurisdiction to the registrar would " be contrary to the obvious " intention of the legislature." We think it is at any rate doubtful whether the legislature intended to preclude parties from resorting to the courts for the decision of issues of property arising under the general law. In that case it was clear that the

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(1) [1926] Ch. 758, 775. (2) 14 Sc. L. T. 818.

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fact that the money was in the Post Office Savings Bank had nothing to do with the dispute to be decided. In the present case the dispute has nothing whatever to do with the fact that the form of property happens to be National Savings Certificates. Such property with other property might be involved in proceedings under a will or a settlement and it would at least be inconvenient if, no dispute having arisen with the Postmaster-General, the courts were deprived of jurisdiction qua this item of the property involved.

We therefore decide that the appeal should be allowed with costs and the action remitted to the county court for trial. As to the costs of the first hearing in the county court, subject to what counsel may say, we think that the husband should have them as the hearing related to and was in effect wasted by reason of the preliminary point being taken. The costs of the action other than the costs of the first hearing will, of course, remain to be disposed of after the action is tried.

Appeal allowed.

Solicitors: *Robinson & Bradley; D. B. Levinson & Shane.*

H. C. G.

WALLACE *v.* MAJOR.

1946
May 1.
Lord Goddard C.J., Humphreys and Singleton JJ.

Justices—Road traffic—Disabled motor lorry in tow—Dangerous driving—Person steering disabled lorry—Whether "driver"—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 11, *sub-s.* 1, *s.* 121.

A person who is at the wheel of a disabled motor vehicle for the purpose of steering it while it is being towed by another motor vehicle is not a driver and is not driving a mechanically propelled vehicle within the meaning of s. 11 of the Road Traffic Act, 1930.

Section 121 of the said Act, which provides that: "'Driver,' "where a separate person acts as steersman on a motor vehicle, "includes that person as well as any other person engaged in the "driving of the vehicle, and the expression 'drive' shall be con- "strued accordingly," applies only where separate persons, performing the duties of steersman and driver respectively, are on one vehicle.

CASE STATED by justices of West Riding of Yorkshire.

On September 8, 1945, when an army motor lorry, which was disabled by reason of mechanical defect and incapable of proceeding under its own power, was being towed by another motor lorry, it came into collision with a passing motor. The disabled motor lorry was at the time being steered by the respondent Major, and at a sitting of the justices at a court of summary jurisdiction at Snaith, an information was preferred by the appellant Wallace, against the respondent Major, that he did unlawfully, at Eggborough in the said Riding, drive a motor vehicle on a road in a manner which was dangerous to the public, contrary to s. 11 of the Road Traffic Act, 1930. The justices dismissed the information, being of opinion that the respondent was not the driver of a mechanically propelled vehicle within the meaning of the Road Traffic Act. The appellant appealed.

Cumming-Bruce for appellant. The short question for determination is whether the person steering a disabled motor lorry which is being towed by another motor lorry is the "driver" of a motor vehicle within the purview of s. 11 of the Road Traffic Act, 1930 (1). The object of s. 1 of that Act is to include within the operation of the statute all categories of motor transport constructed and designed to be mechanically propelled and intended and adapted for use on roads, and also the class of vehicles constructed or designed for use as trailers. In that section and the following sections the term motor vehicle is contrasted with the term trailer and is used to denote vehicles according to their construction and design. In s. 2 motor vehicles are classified, according to construction and design, under a series of sub-headings. In s. 3 "motor "vehicle" and "trailer" are used as being different types or classes of vehicles, and it is clear that "motor vehicle" is used to describe a mechanically propelled vehicle intended or adapted for use on roads. If the engine of such a vehicle is temporarily disabled it nevertheless remains a mechanically propelled vehicle intended or adapted for use on roads, and the person in charge remains the driver. It is plain from the wording of the Act that motor vehicle and trailer are mutually exclusive classes of vehicle.

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(1) Road Traffic Act, 1930, s. 1: "This part of this Act shall apply "to all mechanically propelled "vehicles intended or adapted for "use on roads (in this Act referred "to as 'motor vehicles') and to "vehicles (in this Act referred to "as 'trailers') drawn by motor "vehicles."

Section 11, sub-s. 1: "If any "person drives a motor vehicle on "a road recklessly, or at a speed "or in a manner which is "dangerous to the public, having "regard to all the circumstances "of the case" he shall be guilty of an offence.

Section 121: "'Driver,' . . . . "where a separate person acts as "steersman on a motor vehicle, "includes that person as well as "any other person engaged in the "driving of the vehicle, and the "expression 'drive' shall be con-"strued accordingly."

[LORD GODDARD C.J. I see that in reg. 48 of the Motor Vehicles (Construction and Use) Regulations, 1941 (1) a broken down motor vehicle is treated as a trailer. Once you get into the area where a motor vehicle can be a trailer the two classifications are not mutually exclusive.]

Section 121 of the Act speaks of the steersman of a motor vehicle and provides that " driver " shall include that person.

John Foster for the respondent. A vehicle is no longer a mechanically propelled vehicle when it ceases to be capable of being propelled by its own power. The real question for decision here is whether this disabled vehicle was being driven by the respondent. Giving the word its ordinary meaning it is plain that the lorry was not being driven by anybody, but was being drawn. Regulation 82 of the Motor Vehicles (Construction and Use) Regulations, 1941, provides that " No person while " actually driving a motor vehicle shall be in such a position " that he cannot have proper control over the vehicle or that " he cannot retain a full view of the road and traffic ahead." If the steersman of a disabled motor vehicle in tow is held to be a " driver " then no one could safely undertake that duty, because he could not comply with the conditions and would always be committing a breach of the regulation. A towed motor vehicle is a trailer. Section 121 of the Act of 1930 only applies where one vehicle, such as a steam engine, has both a driver and a steersman, and that is not this case. The justices came to a right decision.

LORD GODDARD C.J. This case raises an interesting and, at first sight, rather difficult point, and it is a great satisfaction to

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(1) St. R. & O., 1941. No. 398, reg. 48: " *Trailers*. Overall " length of a trailer shall not " exceed twenty-two feet. Pro- " vided that this regulation shall " not apply to a trailer constructed " and normally used for the con- " veyance of indivisible loads of " exceptional length, to a land " implement, to a trailer forming " part of an articulated vehicle, to " any broken down vehicle which " is being drawn by a motor " vehicle in consequence of the " breakdown, or to a trailer which " is a trolley vehicle in course of " construction or delivery."

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the court that it has been so well argued. Mr. Cumming-Bruce has put the case for the appellant just as well as he possibly could put it, and the court is much indebted to him for a very clear and comprehensive argument; but having heard the answer that Mr. Foster made to it, I have come to the clear conclusion that the justices were right. The matter arises in this way: The charge against the appellant was that "he "unlawfully did drive a motor vehicle, to wit, a motor lorry on "a road called Pontefract Road in a manner which was "dangerous to the public, having regard to all the circumstances "of the case . . . . contrary to s. 11 of the Road Traffic "Act, 1930." Shortly stated the offence charged is what is commonly called dangerous driving.

Certain facts were admitted before the justices, and the point was taken on those admissions that the respondent could not be in any case convicted because he was not the driver of the motorcar. The justices, without going into the merits so far as concerned the dangerous driving or otherwise, upheld that contention and dismissed the information. The question that we have to decide is whether or not they were right in holding that the man was not the driver on the admitted facts of the case. The facts in the case are that a motor vehicle was proceeding along the road towing another vehicle, and the respondent was the man who was steering the towed vehicle. The towed vehicle at that time had broken down, or was incapable of being driven, by reason of some mechanical defect, and, therefore, it was being towed by another vehicle.

The justices having come to their conclusion and dismissed the information, it is necessary for this court to consider some of the relevant sections of the Road Traffic Act of 1930. Section 1 provides: "This Part of this Act"—which includes s. 11—"shall apply to all mechanically propelled vehicles intended or "adapted for use on roads (in this Act referred to as 'motor "'vehicles') and to vehicles (in this Act referred to as "'trailers') drawn by motor vehicles." It seems quite clear that what I have compendiously called a motor vehicle can be not only a motor vehicle but can be also a trailer; but that really is not the main point in this case, because whether it is a trailer or whether it is to be regarded as a mechanically propelled vehicle, the point which is taken by Mr. Foster, in support of the justices' decision, is that this man in any case was not driving a motor vehicle; that he was simply steering a broken-down motor vehicle which was in tow; and that, ordinarily speaking, giving the ordinary meaning to words in the English language, it is difficult to see how a person who is merely at the steering wheel of a car and having nothing to do with the propulsion of the car, having nothing to do with making the car go, is driving the vehicle. The vehicle, in fact, was not being driven ; it was being drawn. That is one way of putting it; but the main answer that was made for the appellant to that point was that by s. 121 : " 'Driver,' where a separate " person acts as steersman on a motor vehicle, includes that " person as well as any other person engaged in the driving of " the vehicle, and the expression 'drive' shall be construed " accordingly."

So it is said that when s. 11 says " if any person drives a " motor car " that is to include the person who steers a motor car. The reason why I think that argument must be rejected is that the passage in s. 121 which I have just read obviously contemplates two persons being in charge (I think I may use that expression) of the same vehicle, and it is, I think, probably designed especially to meet the case of a steam wagon in which one man is making the wagon go by working the regulator and seeing that the pressure of steam is kept up, in exactly the same way as an engine driver on a railway does, and another person is directing the braking of the vehicle and steering it, and it is desired that he should be liable for negligent driving or dangerous driving just as much as the person who otherwise might be called the driver. Of course, it might be that in such a case both would be liable. If the driver who is responsible for the safety of the vehicle was driving it at an excessive speed he might properly be prosecuted for proceeding at an excessive speed ; if, on the other hand, the negligent driving was caused by the negligent steering of the vehicle, then it is thought that the steersman should be a person to be regarded equally as a driver ; but that paragraph of s. 121 cannot, in my opinion, have any bearing on the present case, because this is not a case where there were two people in charge of the vehicle but only one, and the man who was acting as steersman of the vehicle was not, in my opinion, acting as the driver. After all, we have to remember that this is a penal Act and we are bound to construe it strictly and ought not to stretch the language in any way. In my judgment it is impossible to say that a person who is merely steering a vehicle which is being drawn by another vehicle is driving that vehicle. No doubt he is controlling it to some extent ; no doubt he is doing many things which a driver

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would have to do; but before he can be convicted of being a person driving a motor car in a dangerous manner, it must, it seems to me, be shown that he is at least driving it; that is to say, making the vehicle go.

Our attention has been drawn by Mr. Foster to reg. 82 (2.) of The Motor Vehicles (Construction and Use) Regulations 1941, which provides that " No person while actually driving a " motor vehicle shall be in such a position that he cannot have " proper control over the vehicle or that he cannot retain a full " view of the road and traffic ahead." It is quite obvious that a person who is merely steering a towed vehicle cannot have proper control; he certainly cannot have full control; and though he might have as much control as could fairly be attributed to a person on a towed vehicle, it is obvious he cannot retain a full view of the road and traffic ahead. Therefore it would follow that every person who is steering a broken-down car which is being towed by another car would be committing an offence every time he did it. There seems to be no previous authority on the point at issue except this, that it has got into the text-books and has been noted in the Justice of the Peace Reports, that Charles J. at Warwick Assizes held that a steersman of a towed vehicle was not obliged to have a licence; and if he had been a driver of a motor car he obviously would have had to possess a licence under s. 4 of the Act, which provides that " A " person shall not drive a motor vehicle on a road unless he is " the holder of a licence . . . . " (1). In my opinion, Charles J. was right, and his decision is in accordance with the decision of this court that the person who is steering the towed vehicle is not the driver of the vehicle.

Our attention has also been called to a provision in the Road Traffic Act of 1936, which provides that, " Notwith-" standing the provisions of sub-s. (1.) of s. 4 of the Road " Traffic Act, 1930, a person who is not the holder of a licence " to drive a motor vehicle issued under Part I. of that Act may " act as steersman of a motor vehicle (being a vehicle on which " a speed limit of five miles per hour or less is imposed by or " under s. 10 of that Act) . . . . " Such a vehicle is a locomotive under the other provisions of the Road Traffic Act, 1930; but that section is obviously designed to cover the same point as s. 121 of the Act of 1930, in making a steersman of a motor vehicle which has also someone else upon it, a driver.

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(1) Unreported. See Mahaffey and Dodson, Road Traffic Act, 1936, 2nd ed., p. 12, notes to section 4.

In those particular circumstances where there are two people engaged, as I have already said, in the control or management of some of these vehicles, the steersman is to be deemed to be the driver. I think the word " steersman " only occurs in the Act of 1930 in that particular clause which makes the word " driver " include someone who would not ordinarily be regarded as a driver. Obviously, therefore, when you find the word " steersman " again used in the Act of 1936 it is dealing with the provision in the Act of 1930 which, as I have already said, does not apply to this case.

For these reasons I am of the opinion that the justices came to a right decision in this case, and the appeal must be dismissed with costs.

HUMPHREYS J. I am of the same opinion. My Lord has covered all the ground in this case, and I only want to say just a word or two as to the way in which the matter strikes me. I was very much impressed, in the first instance, by Mr. Cumming-Bruce's argument that while s. 11 of the Road Traffic Act, 1930, read, as it has to be, with s. 1, would probably not cover the case of a person who was steersman of a trailer and would not include him in the word " driver," there was apparently a special provision in that Act stating that for the purpose of the Act, and for all purposes of the Act, the steersman of such a vehicle was to be deemed a driver. That was a reference by learned counsel to s. 121. Until one gives the matter further consideration and gets the assistance which we had from Mr. Foster, it appears to be a very reasonable construction. What it says is, " ' Driver,' where a separate " person acts as steersman of a motor vehicle, includes that " person as well as any other person engaged in the driving of " the vehicle, and the expression ' drive ' shall be construed " accordingly." Why, then, should it not be said that the person who is steering the towed vehicle is a driver for the purposes of the Act ? I think the answer comes when one looks a little more carefully at the exact words in that definition. The words are " ' Driver ' . . . . where a separate person acts " as steersman of a motor vehicle "—that is one motor vehicle and one man—" includes that person as well as any other person " engaged in the driving of the vehicle . . . . " It seems to me there is one vehicle and two persons, both of whom may be deemed, and we now declare are to be deemed, to be the driver. Those words do not fit the facts in this case, because here there were two separate vehicles. I think my Lord's view must be the right one, that the statement or inclusion of the word "steersman" and the word "driver" must relate to some such matter as my Lord has referred to—that is to say, probably a steam wagon where you have two men, and are required to have two men, by the Act, one of whom is the steersman and the other is for all practical purposes the driver.

When once s. 121 goes, it seems to me that the whole of the argument of Mr. Cumming-Bruce goes too, because you are left in this position: Charge: this man drove a motor vehicle on a road contrary to the terms of s. 11, assuming that the thing he was driving was a motor vehicle. The thing that he was concerned with was a motor vehicle. I think it comes precisely within the language of s. 1, which says that, "This Part of this "Act shall apply to all mechanically propelled vehicles intended "or adapted for use on roads . . . ." In my opinion it applies equally to one which has temporarily broken down as it does to one which is, in fact, in working order and going along the road. Then s. 1 says that this Act shall also apply to vehicles in this Act referred to as trailers, which are not driven by anyone at all but drawn by motor vehicles. I have no doubt that this disabled vehicle, which was being drawn by a motor vehicle, was a trailer, but what about the driver? It seems to me to be a contradiction in terms really to say that this respondent was driving at all—that he was a driver in the ordinary sense of the word—and, according to the admission of the learned counsel for the appellant, unless you can bring in s. 121, in the ordinary acceptation of the term the person who was driving that contraption was the man in charge of the towing vehicle. I think that is the common sense of the matter. Just to look at the section in the Act of 1936, what that shows is that if you take a man in the position of the person who was charged here, if he was the driver, then he required a licence. That is quite clear, because the case taken in that Act by s. 1 is that a person who is not the holder of a licence to drive a motor vehicle may act as steersman on a motor vehicle in one instance, and one instance only, and that is if it is one of those which is not allowed to go more than five miles an hour, involving the proposition that if it is an ordinary motor car he must have a licence if he is the driver, the only answer to which must be, it seems to me, he is not the driver.

Again, reg. 82 of the Motor Vehicles (Construction and Use) Regulations, 1941, provides that no person while actually

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driving a motor vehicle shall be in such a position that he cannot have a proper control over the vehicle. No one could ever act with safety as the driver of a towed vehicle, because he never can have a proper vision and proper control over the vehicle.

Then the regulation goes on, " or in such a position . . . . " that he cannot retain a full view of the road and traffic " ahead." No person in such a position could ever do it.

Those are the sort of reasons which satisfy me that my Lord must be right in holding as he has (and I agree with him) that s. 121 has no relation to the facts in this case at all; that this man was rightly dealt with by the justices as a person who was not the driver of the motor vehicle in question.

SINGLETON J. I agree, and I would add only this. A new Road Traffic Act appears every few years and no doubt there will be another before very long. I hope that when that comes about consideration will be given to the position of those who may be in the position of the respondent in this case. It may be that in such event an alteration will be made in the law, so that a person who is sitting at the wheel of a towed car, may at least be placed in the same position as the driver of another vehicle, and I see no reason why he should not be. If that happens, then, indeed, Mr. Cumming-Bruce's argument, which we have all appreciated, will not have been in vain.

Appeal dismissed, with costs.

Solicitors for appellant: *Phillips, Cummings & Ashton, for R. C. Linney, Wakefield.*

Solicitor for respondent: *Treasury Solicitor.*

A. W. G.

EYRE *v.* JOHNSON.

1946
Apr. 2.

Denning J.

Emergency legislation—Landlord and tenant—Lease—Covenants by tenant to keep and yield up premises in repair—Covenant to paint inside and outside in the last three months of the tenancy—Work unlawful, without licence—Licence refused—Claim for damages for breach of covenants—Defence (General) Regulations 1939, *No.* 56A.

In 1930, a landlord let a house for twenty-one years, the lease containing covenants by the tenant to keep and yield up the premises in repair. The tenant having given six months' notice,

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pursuant to the terms of the lease, to determine the tenancy in December, 1944, applied to the Minister of Health for licences to effect repairs, but these were refused and the premises were yielded up to the landlord unrepaired. In an action for damages for breach of the covenants to repair, the tenant pleaded that performance of the covenants became illegal by reason of the Defence (General) Regulation, 1939, No. 56A, and that therefore he was not liable. The judge found that, since the outbreak of war in 1939 very little had been done to the premises by the tenant by way of repair. There was no regulation restricting the tenant from effecting repairs until 1941 and from 1941 to 1944 the limit of work which could be done without licence was at first 500*l.* and then 100*l.*

Held, that (1.) the condition of non-repair of the house was due to a series of breaches of covenant to keep in repair; and (2.) the landlord having performed his obligations under the lease, the fact that it had become difficult or even impossible for the tenant to perform certain of his obligations under the lease, did not amount in any sense of the word to frustration and did not relieve the tenant from the payment of damages for his breaches of covenant.

Matthey v. *Curling* [1922] 2 A. C. 180, applied.

Action tried by Denning J.

In 1930, the plaintiff, the landlord, let No. 7 Lowden Road, St. John's Wood to the defendant, the tenant, by a lease for twenty-one years with liberty to the tenant to determine the lease at the end of the seventh or fourteenth year. The lease contained a covenant to paint inside and outside the house at certain specified times including, in particular, the last three months of the tenancy. There was also a covenant to keep the house in repair during, and a covenant to yield up the premises in repair at the end of, the term. The tenant by six months' notice pursuant to the terms of the lease determined the lease in December, 1944, at the end of the fourteenth year. After the tenant had given his notice to determine the tenancy, he applied to the Minister of Health for licences to execute the repairs necessary, but these were refused and the premises were yielded up to the landlord unrepaired. Thereupon, the landlord brought this action for damages for breach of covenants to repair. By his defence, the tenant pleaded that performance of the covenants to repair became illegal by reason of reg. 56A of the Defence (General) Regulations and that, therefore, he was not liable. The evidence of want of repair was that of the tenant's architect who had made a report thereon when the licences were refused. A surveyor for the landlord said that judging from the condition of the premises in 1944, very little by way of repair had been done by the tenant since the outbreak of war in 1939, and this Denning J. found as a fact.

Beney K.C. and *O'Malley* for the landlord. The evidence shows that the premises were out of repair long before the tenant applied in 1944 for the licences ; the condition was of long standing. His earlier failure to keep in repair is not excused by a last moment attempt to do the work at a time when a licence was difficult to obtain. Even if the reparative work was unlawful at the end of 1944, there was nothing unlawful in yielding up the premises in repair, though this may have been in fact impossible to achieve. A person can bind himself by covenant to do the impossible. Such a case was *Matthey* v. *Curling* (1), where Lord Buckmaster said that the covenant in the defendant's lease to deliver up the premises binds him even if circumstances over which he has no control prevent him so doing (2).

Garland for the tenant. There is no evidence of any want of repair before the end of the term other than the report of the tenant's architect made at the time when he was refused licences to do the repairs. Licences having been refused, it left the defendant in the position that it was unlawful for him to do any work of reparation at the time the premises were found to be in want of repair. The rule laid down in *Brewster* v. *Kitchell* (3) and approved in *Baily* v. *De Crespigny* (4) applies that if a person covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. The tenant would have committed a criminal act had he performed the repairing covenants of the lease, when the evidence shows he ought to have performed them. The court cannot say to a man we will punish you if you perform your covenant and mulct you in damages for breach of covenant if you do not.

DENNING J. The point which is taken by the defendant is : "It was illegal under the regulations for me to perform the "covenant and, therefore, I could not perform it and I am not "liable in damages." The first answer to that is that I think this condition of non-repair was really brought about by a series of breaches of the covenant to keep in repair. If the lessee had performed his covenants from 1939 to 1941 when there was no regulation on the matter, or even from 1941 to 1944 when there was a regulation, but the limit was at first 500*l.* and then 100*l.*, I do not think there would have been any difficulty in keeping these premises in proper repair and there would have been nothing to prevent him performing his covenant. He cannot rely, as a defence to this action, on a condition of things which his own breaches have brought about.

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(1) [1922] 2 A. C. 180.
(2) Ibid. 228.
(3) (1698) 1 Salk. 198.
(4) (1869) L. R. 4 Q. B. 180.

That really is a sufficient answer to this defence, but I go further. It seems to me that although illegality which completely forbids the performance of a contract may give rise to frustration in some cases, illegality as to the performance of one clause which does not amount to frustration in any sense of the word, does not carry with it the necessary consequence that the party is absolved from paying damages. Take this case. The landlord has performed all his part of the bargain. The tenant has had the premises all this time. The fact that it has become difficult, or even impossible, for the tenant to perform the covenants does not relieve him from the obligation of paying damages. The case of *Baily* v. *De Crespigny* (1) was cited to me on behalf of the tenant. When that case was considered in the House of Lords in *Matthey* v. *Curling* (2), Lord Buckmaster said (3): "I find myself unable to think "that this has any application to a covenant entered into by a "lessee, either to pay rent or to deliver up the premises. "He has bound himself to do these definite acts, and it is no "excuse that circumstances which he could not control have "happened and have prevented his compliance." In that case the tenant was held liable on his repairing covenant, although circumstances which he could not control had happened and prevented his compliance. So that here, even assuming circumstances beyond the tenant's control which prevented his compliance, I am satisfied that they do not establish a defence to this action for damages. On both grounds therefore I hold in favour of the landlord and I award in this action the sum of 670*l.* and I order the defendant to pay that amount with costs.

Judgment for plaintiff.

Solicitors for landlord: *Lee & Pembertons.*
Solicitors for tenant: *Sydney Redfern & Co.*

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(1) L. R. 4 Q. B. 180.
(2) [1922] 2 A. C. 180.
(3) Ibid. 228.

C. G. M.

REX *v.* THE MINISTER OF HEALTH AND OTHERS.

Ex parte WATERLOW & SONS, LIMITED.

1946
June 3.

Lord Goddard C.J., Humphreys and Singleton JJ.

Housing — Compulsory acquisition of land — Sports ground — " Part " of pleasure ground "—Authorization to enter given by Minister—Application for certiorari by person aggrieved—Whether competent —Housing Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 51), *s.* 75, *sch. II., paras.* 2, 3—*Housing* (*Temporary Accommodation*) *Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 36), *s.* 6.

By s. 75 of the Housing Act, 1936 (with which Act, the Housing (Temporary Accommodation) Act, 1944, is to be read as one) there is excluded from compulsory acquisition for the purpose of Part 5 of the Act " any land . . . . which at the date of the " compulsory purchase order forms part of any park, garden or " pleasure ground, or is otherwise required for the amenity or " convenience of any house." The Minister of Health, purportng to act under the provisions of s. 6 of the Housing (Temporary Accommodation) Act, 1944, gave an authorization tc a local authority to enter and take possession for the purpose of Part V. of the Housing Act, 1936, of part of a piece of land owned by the applicants and maintained by them as a sports ground for their employees. The applicants applied for an order of certiorari to bring up and quash the authorization on the ground that the sports ground in question formed part of a pleasure ground and, as such, was exempt from compulsory acquisition by the terms of s. 75 of the Housing Act, 1936. It was contended on behalf of the Minister that by reason of the provisions of sch. II. to the Act of 1936, the remedy by certiorari was no longer open to the applicants, and, that in any event, the sports ground, not being appurtenant to a house, was not exempt from compulsory acquisition :—

Held, that the procedure substituted by sch. II. to the Housing Act, 1936, for testing the validity of an order for compulsory acquisition by an application to the High Court in place of proceedings by certiorari or prohibition, did not apply in the case of an authorization by the Minister to a local authority to enter and take possession of land under s. 6 of the Housing (Temporary Accommodation) Act, 1944, since the procedural machinery under that Act differed from that prescribed in the case of an order for compulsory acquisition under the Housing Act, 1936, to such an extent as to render inappropriate the substituted remedy by application to the court and that proceedings by certiorari or prohibition were still available to the applicants for the purpose of testing the validity of the authorization given by the Minister, but

Held also, that the language of s. 75 of the Housing Act, 1936, must be read as meaning " land which forms part of a park, garden " or pleasure ground or for any other reason is required for the " convenience or amenity of any house," and that, as the part of

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the sports ground sought to be acquired was not appurtenant to any house, it was not land which the local authority was forbidden to acquire by the terms of the section.

APPLICATION FOR ORDERS OF CERTIORARI.

The applicants, Waterlow & Sons, Ld., were the owners of a piece of land situated in the borough of Walthamstow, which for upwards of thirty-two years had been properly equipped as a sports ground for the recreation of their employees and was used by between 4,000 and 5,000 men and women. The Corporation of Walthamstow, who were the second respondents to the motion, gave notice to the applicants that they proposed to take over part of the ground of an area of 507 feet by 200 feet for the purposes of Part V. of the Housing Act, 1936, in accordance with the provisions of s. 6, sub-s. 1, of the Housing (Temporary Accommodation) Act, 1944, which Act, by s. 9, sub-s. 4, thereof is to be construed as one with the Housing Act, 1936. On December 31, 1945, the Minister of Health, purporting to act under the provisions of s. 6 of the Act of 1944, gave an authorization to the local authority to enter and take possession of the land. The applicants thereupon applied for an order of certiorari to bring up and quash the authorization granted by the Minister on the ground that the land in question formed part of " a park, garden or pleasure ground " within the meaning of s. 75 of the Housing Act, 1936 (1), and, as such, was exempt from compulsory acquisition.

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(1) Housing Act, 1936, s. 75: " Nothing in this Act shall authorize the compulsory acquisition for the purposes of this Part of this Act of any land . . . . which at the date of the compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house."

Schedule II., para. 1: " So soon as may be after a compulsory purchase order . . . . has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection."

Paragraph 2: " If any person aggrieved by such an order as aforesaid . . . . desires to question the validity thereof on the ground that it is not within the powers of this Act . . . . he may, within six weeks after the publication of the notice of the confirmation of the order . . . . make an application for

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Paull K.C. and *Sophian* for the applicants. The Minister had no power to issue an authorization to the local authority to enter and take possession of that part of the applicants sports ground to which the authorization relates, since the land was a "pleasure ground" within the meaning of s. 75 of the Housing Act, 1936, and consequently exempt from compulsory acquisition. It is not disputed by the respondents that the sports ground is a pleasure ground, but it is suggested on behalf of the Minister that to come within the terms of s. 75 the pleasure

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" the purpose to the High Court " . . . ."

Paragraph 3: "Subject to the " provisions of the last preceding " paragraph, the order, ... " shall not be questioned by " prohibition or certiorari or in " any legal proceedings what- " soever . . . . and shall become " operative at the expiration of " six weeks from the date on " which notice of confirmation of " the order . . . . is published in " accordance with the provisions " of this Act."

The Housing (Temporary Accommodation) Act, 1944, s. 6, sub-s. 2: "A local authority for " the said purposes may enter " upon and take possession of " land as to which the Minister is " satisfied that it is required for " use as aforesaid if authorization " in writing in that behalf has been " given to them in accordance " with the following requirements, " that is to say:—

(*a*) "the authority must have " served, in manner mentioned in " the next succeeding subsection, " on every owner and occupier of " the land in question a notice in " writing stating that they have " made or intend to make an " application to the Minister for " an authorization under this sub- " section as respects land described " in the notice . . . . and that " representations which any of " the persons required to be served " desires to make must be made " to the Minister in writing within " fourteen days from the date of " the service of the notice on him; " and

"(*b*) the Minister must, before " giving the authorization, have " considered any representations " made to him as aforesaid by " any of the persons aforesaid."

Sub-s. 4: "Where a local " authority have taken possession " of land pursuant to an authori- " zation under this section, they " shall by virtue of this section " have power to acquire the land " compulsorily as if they had been " authorized to do so by an order " under s. 74 of the principal Act, " made, submitted and confirmed " in accordance with the provisions " of the First Schedule thereto, " incorporating the enactments " required to be incorporated in " such an order . . . . and the " authority shall as soon as may " be after taking possession of the " land serve notice under s. 18 of " the Lands Clauses Consolidation " Act, 1845, of their intention to " take the land and shall in all " respects be liable as if such " notice had been given on the " date of their entering on the " land, except that the power " conferred by sub-s. (2) of s. 5 of " the Acquisition of Land (Assess- " ment of Compensation) Act, 1919, " to withdraw such a notice shall " not be exercisable."

ground must be required for the amenity or convenience of a house. There is no direct authority on the point but the matter was considered in *Ripon (Highfield) Housing Confirmation Order*, 1938. *White and Collins* v. *Minister of Health* (1) where Luxmoore L.J. said that the words in s. 75 "otherwise "required for the convenience or amenity of any house" did not qualify the words "part of a park, garden or pleasure "ground" but constituted an alternative ground of exemption from compulsory acquisition. He said "The section should in "my judgment be read in the same way as if it had been "expanded as follows :—'any land which is part of a park, "'garden or pleasure ground or any land which is otherwise "'required for the amenity or convenience of any house.' "The presence of the word 'otherwise' seems to preclude any "other meaning, for it predicates that the land to which it "refers is other than 'part of a park, garden or pleasure "'ground'." Although that statement was obiter as concerned the case under consideration, it is submitted that it correctly interprets the section. The section was also considered by du Parcq J. in *Re Newhill Compulsory Purchase Order*, 1937, *Payne's Application* (2) but there was no decision on the point now raised. It is submitted that for part of a pleasure ground to be exempt from compulsory acquisition it is not necessary that it should be required for the amenity or convenience of a house.

Sir Hartley Shawcross A.-G. and *H. L. Parker* for the Minister of Health. Two questions arise for decision, firstly, whether the remedy by certiorari is open to the applicants and secondly, if so, whether the sports ground in the present case is exempt from compulsory acquisition. Dealing with the latter point first, it is conceded that for dictionary purposes a sports ground might properly be described as a pleasure ground but it is not admitted that it is necessarily a "pleasure ground" for the purposes of s. 75. The broad meaning of that section is that lands may not be compulsorily required if they form part of the lands of a house and are used for the amenities of that house. The word "otherwise" in the section would be otiose unless it referred to the words "park, garden or pleasure ground." "Pleasure ground" must be read as something ejusdem generis with park or garden and a sports ground is not ejusdem generis with them. An illustration of this is to be found in the Access to Mountains Act, 1939, s. 2, sub-s. 2 (*d*)

(1) [1939] 2 K. B. 838, 851.

(2) [1939] 2 All. E. R. 163.

and (*e*) where a clear distinction is drawn between (*d*) " land " used for the purpose of a park, garden, or pleasure ground or " otherwise for the amenity or convenience of a dwelling- " house ; " and " (*e*) land used for the purpose of a golf-course, " racecourse, training gallop, sports-ground, recreation or " pleasure ground, shooting range or aerodrome." With regard to the question of the remedy open to the applicants in such a case as the present, it is clear that the granting of the authorization cannot be questioned by certiorari or prohibition. By s. 9, sub-s. 2, of the Housing (Temporary Accommodation) Act, 1944, it is provided that that Act is to be construed as one with the Housing Act, 1936. Paragraph 2 of sch. II. to the latter Act provides that any person aggrieved by the making of a compulsory purchase order, which takes the place of the authorization in the present case, may make an application to the High Court to question the validity of the order and para. 3 says that the order shall not be questioned by prohibition or certiorari or in any legal proceedings whatsoever. The substituted procedure provided by the schedule to the Housing Act, 1936, is, therefore, the only remedy open to the applicants.

Erskine Simes K.C. and *C. E. Scholefield* for the Walthamstow Corporation. Unless the words " park, garden or pleasure " ground " in s. 75 are to have the connotation of being appurtenant to a house, the word " otherwise " in the section is useless. [They referred to the Lands Clauses Consolidation Act, 1845, s. 92, and *Low* v. *Staines Reservoirs Joint Committee* (1).]

Paull K.C. in reply. Certiorari will lie in the present case notwithstanding that the Act of 1944 is to be read as one with the Act of 1936. The rule is that where one Act is to be read with another, the provisions of each are to be incorporated unless it is impossible in practice to carry them out. In *Phillips* v. *Parnaby* (2), Lord Hewart C.J., in his judgment quoted the words of Lord Selborne L.C. in *Canada Southern Ry. Co.* v. *International Bridge Co.* (3), where, referring to two statutes which were there in question, he said " It is to be " observed that those two Acts are to be read together . . . . " and therefore we must construe every part of each of them as " if it had been contained in one Act, unless there is some mani- " fest discrepancy, making it necessary to hold that the later

(1) (1900) 64 J. P. 212.
(2) [1934] 2 K. B. 299, 301.
(3) (1883) 8 App. Cas. 723, 727.

"Act has to some extent modified something found in the "earlier Act." Such a discrepancy exists in the present case since it is clear that the method by which the land is to be taken over under the Act of 1944 modifies the provisions which are to be found in the Act of 1936. In para. 1 of sch. II to the Act of 1936 there is a provision for the publication in a newspaper of a notice of the confirmation of a provisional order and in para. 2 it is provided that any person aggrieved by the order may apply to the High Court within six weeks of the publication of the notice. Under the Act of 1944 there is no order which has to be confirmed and published, and no period of six weeks within which an aggrieved person may apply. Although the Acts must be read as one so far as any provision which affects the rights of people is concerned, it is not necessary to read them as one so far as procedural machinery is concerned, if it is not convenient to do so. The provisions of paras. 2 and 3 of sch. II. to the Act of 1936, by substituting the remedy of an application to the High Court for proceedings by certiorari or prohibition, in the case of an order for compulsory purchase, have not done away with those remedies in a case falling under the Act of 1944, to which the procedure contained in the two paragraphs is quite inapplicable. [He referred to *The State* (*Wood*) v. *West Cork Board of Health and Minister for Local Government* (1).]

LORD GODDARD C.J. This is an application for an order of certiorari to bring up and quash an authorization given by the Minister of Health, purporting to act under the provisions of s. 6 of the Housing (Temporary Accommodation) Act, 1944, to the Corporation of Walthamstow, authorizing them to enter and take possession for the purpose of Part V. of the Housing Act, 1936, of certain land, being a sports ground owned by the applicants, Waterlow & Sons, Ld., and kept by them for the benefit of their employees. The matter arises in this way: under the Housing (Temporary Accommodation) Act, 1944, which is to be read as one with the Housing Act, 1936, a local authority has power to apply to the Minister for his authorization to acquire certain land compulsorily, and for the purpose of expediting proceedings in the present housing emergency, much of the machinery of the Housing Act, 1936, is altered. For example, no public inquiry has to be held, and although the Minister must consider any representations made to him

(1) [1936] I. R. 401.

by the owners of the land, if he gives an authorization the local authority can enter straight away, and are empowered to acquire the land in the same way as if they had been authorized to do so by an order under s. 74 of the Housing Act, 1936, and thereupon they must buy the land and pay compensation to the owner. In the present case it is said that the local authority has no power to acquire the land in question because it forms part of a pleasure ground and the acquisition of part of a pleasure ground is forbidden by s. 75 of the Housing Act, 1936.

The first point argued by the Attorney-General on this motion is that certiorari does not lie. His argument is that the only provision which gives a right to apply to the High Court is to be found in para. 2 of sch. II. to the Act of 1936, which provides that an application may be made to the High Court if any person aggrieved by the making of a compulsory order desires to question its validity. That schedule is dealing with compulsory orders and s. 75 also refers to land " which at the " date of the compulsory purchase order forms part of any park, " garden or pleasure ground " and it is therefore desirable to consider whether there is " a compulsory order " in this case. In the opinion of the court, the authorization which is granted under s. 6 of the Housing (Temporary Accommodation) Act, 1944 is (leaving on one side for the moment any question of procedure), the equivalent of a compulsory purchase order by reason of the provisions of sub-s. 4 of the section.

[His Lordship read the subsection, and continued :] It seems to me, therefore, that as soon as the Minister has given his authorization, the position is to be exactly the same as if a compulsory purchase order had been made, submitted and confirmed and, consequently, that any provisions dealing with a compulsory purchase order which are to be found in the Act, (apart from those dealing with procedure), apply to an authorization given under the Housing (Temporary Accommodation) Act, 1944. I think the court must, therefore, deal with the case on the basis that the authorization is to be regarded as if it were a compulsory purchase order.

The next question is whether, in the circumstances of the present case, certiorari will lie. That depends on the provisions of sch. II. to the Act of 1936. Paragraph 1 of that schedule provides for the publication in a newspaper of the confirmation of the order for compulsory purchase. That provision has no bearing on the present case because it is not applicable under the Act of 1944. Paragraph 2 provides that if any person aggrieved by an order desires to question its validity, he may, within six weeks of the publication of the confirmation of the order, make an application for the purpose to the High Court. Paragraph 3 provides that subject to the provisions of para. 2 the order shall not be questioned by prohibition or certiorari or in any legal proceedings whatsoever, and shall become operative at the expiration of six weeks from the date on which notice of confirmation of the order is published. It will be observed that under para. 3 the order does not become operative at once, but only on the expiration of six weeks from the date on which the notice of confirmation is published, and also that in para. 2 a time limit of six weeks after the publication of the confirmation of the order is fixed within which any application is to be made to the court.

Mr. Paull, in answer to the submission of the Attorney-General that certiorari will not lie, contended that the procedure laid down in the schedule to the Act of 1936 cannot be followed because the machinery under the Housing (Temporary Accommodation) Act, 1944, is different from that under the Housing Act, 1936, in that under it there is no publication in a newspaper as there has to be under the earlier Act, and consequently the procedure prescribed in para. 2 of the schedule does not apply. In my opinion that is a good answer to the point taken on behalf of the Minister. I do not think that the remedy by certiorari is taken away. The procedure prescribed by the second schedule is not applicable to the present case and it cannot therefore be said that it has been substituted for that of certiorari. The Attorney-General wished to keep open, though he has not argued the point in this case, the objection that certiorari will not lie because the order of the Minister was merely administrative in its character. We are not called on to pronounce on that question in this case and I may therefore proceed to deal with the real merits of the present application.

The question for determination depends on what is the true construction in s. 75 of the Housing Act, 1936, of the words "any land which . . . . at the date of the compulsory purchase "order forms part of any park, garden or pleasure ground, or is "otherwise required for the amenity or convenience of any "house." It is admitted on behalf of the Minister that the land in question may be described as a pleasure ground because it is a sports ground, but it is contended that the true construction of the section is that the land must form part of land which is appurtenant to a house and that the object of the section is to

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preserve the amenities of a person's house. In my opinion that contention is right. The whole question turns on the word "otherwise" and the meaning of the section would be clearer if it were expressed in this way: "land which forms part of a "park, garden or pleasure ground or for any other reason is "required for the convenience or amenity of a house." So stated it is apparent that the words "required for the convenience or amenity of a house" apply to the words "park, "garden or pleasure ground." Further, I think that the doctrine of ejusdem generis must be applied to the construction of the words "pleasure grounds" showing that it is something in the nature of a park or garden and that it is connected with the amenity or convenience of a house.

For the above reasons I am of opinion that the sports ground in this case, not being appurtenant to any house, is not land which the local authority are forbidden to acquire with the result that the order of authorization was good and this motion must, therefore, be refused.

HUMPHREYS J. That, so far as I am concerned, is the judgment of the court.

SINGLETON J. I agree.

Application refused.

Solicitors for the applicants: *Coward Chance & Co.*

Solicitor for the Minister of Health: *The Solicitor, Ministry of Health.*

Solicitors for Walthamstow Corporation: *Sharpe, Pritchard & Co., for G. A. Blakeley, Town Clerk, Walthamstow.*

P. B. D.

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1946
May 17, 20;
June 4.

Lord Greene M.R., Morton and Somervell L.JJ.

Evidence—Civil action—Accident—Signed statements by two American soldiers—Soldiers returned to United States—Admission of statements in evidence—Jurisdiction of Master—R. S. C. Or. 30, *r.* 2 (*d*)—*Evidence Act,* 1938 (1 & 2 *Geo.* 6, *c.* 28), *s.* 1.

Under the Evidence Act, 1938, s. 1, sub-s. 1, any statement by a person in a document is admissible in evidence in any civil proceedings, if the maker of the statement has personal knowledge of the matter dealt with by the statement and the maker of the statement need not be called as a witness if he is beyond the seas and it is not reasonably practicable to secure his attendance. Subsection 2 provides: "In any civil proceedings the court "may at any stage of the proceedings, if having regard to all the "circumstances of the case it is satisfied that undue delay and "expense would otherwise be caused, order that such a statement "as is mentioned in subsection (1) of this section shall be admissible as evidence . . . ."

Held, (1.) that the words "at any stage of the proceedings" showed that an order might be made before the trial and therefore by interlocutory order; (2.) that the word "court" had different meanings according to the context and that there was no rigid rule making it necessary to construe that word as excluding jurisdiction in chambers; and (3.) that the interlocutory proceedings fell within Or. 30 (2) (*d*) which gave power to the court or a judge on the summons for directions to make orders relating to documentary evidence and therefore they were properly dealt with in chambers.

APPEAL from Croom-Johnson J.

On August 2, 1943, during the hours of darkness the plaintiff Charles John Friend, who was then an officer in the British Army, was riding his pedal bicycle along the Royston to Whittleford Road in the direction of Duxford when he was overtaken and run into by a motor car proceeding in the same direction. The car was driven by the second defendant James Frostick as the servant of the first defendant Charles Wallman. The plaintiff was very seriously injured. There was a prolonged attempt to arrive at a settlement between the parties but ultimately the plaintiff commenced proceedings on July 17, 1945, against the two defendants for damages for negligence. The defendant Frostick denied that he had been guilty of negligence and both defendants set up the defences of contributory negligence and breach by the plaintiff of a statutory duty in regard to lighting.

A statement signed on March 21, 1944, had been obtained from an American soldier who witnessed the accident and another statement signed on March 16, 1944, from an American soldier who brought an ambulance to the scene of the accident to remove the plaintiff. Within a few days after the proceedings were commenced the plaintiff's solicitors interviewed the two American soldiers and photostat copies of the statements were produced and signed by them. Subsequently, on finding that the two soldiers had returned to the United States, they wrote to the defendant's solicitors asking them to admit the two statements in evidence. This was not agreed to and on the summons for directions the plaintiff applied for and obtained an order of the master that pursuant to the Evidence Act, 1938(1), and Or. 37, r. 1 the two written statements should be admitted in evidence at the trial of the action. There was no affidavit proving the absence of the soldiers beyond the seas but the defendants accepted a letter of the United States authorities stating that the soldiers had returned to the United States. On appeal Croom-Johnson J. set aside the order holding that neither the master nor he himself as judge in chambers had jurisdiction to make an order admitting the statements in evidence and that in any case he would not have thought it proper to make such an order until the trial of the action.

C. N. Shawcross (*Rodger Winn* with him) for the plaintiff. The Evidence Act, 1938, s. 1, sub-s. 1, contemplates that the court may admit a signed statement in evidence when the witness is beyond the seas and sub-s. 2 provides that the order

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(1) Evidence Act, 1938, s. 1, sub-s. 1, provides: "In any "civil proceedings where direct "oral evidence of a fact would be "admissible, any statement made "by a person in a document and "tending to establish that fact "shall, on production of the "original document, be admissible "as evidence of that fact if the "following conditions are satis-"fied, that is to say—

"(i.) if the maker of the "statement either—(*a*) had per-"sonal knowledge of the "matters dealt with by the "statement . . . .

"Provided that the condition that "the maker of the statement shall "be called as a witness need not "be satisfied if he is dead . . . . "or if he is beyond the seas and it "is not reasonably practicable to "secure his attendance . . . ."

Subsection 2: "In any civil "proceedings the court may at "any stage of the proceedings, if "having regard to all the circum-"stances of the case it is satisfied "that undue delay or expense "would otherwise be caused, order "that such a statement as is "mentioned in subsection (1) of "this section shall be admissible "as evidence or may, without any "such order having been made, "admit such a statement in "evidence—

"(*a*) notwithstanding that the "maker of the statement is "available but is not called as "a witness;

"(*b*) notwithstanding that the "original document is not pro-"duced, if in lieu thereof is "produced a copy of the original "document . . . . certified to be "a true copy in such manner "as may be specified in the "order, or as the court may "approve, as the case may be."

Sub-section 3: "Nothing in "this section shall render admiss-"ible as evidence any statement "made by a person interested at "a time when proceedings were "pending or anticipated involving "a dispute as to any fact which "the statement might tend to "establish."

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may be made " at any stage of the proceedings," although it can also be admitted by the trial judge. Moreover, sub-s. 5 provides that where there is a jury the judge may reject a statement notwithstanding an earlier order admitting it. The photostat copies it is desired to use in the present case are covered by sub-s. 2. The question is whether " the court " in s. 1 has the same meaning as " the court or a judge " so as to include a master. It is submitted that it has. The word " court " in its strict and narrow sense should mean the Divisional Court but the definition of " court " in s. 6, sub-s. 1, shows that it has a wider meaning than that. [LORD GREENE M.R. In the Chancery Division " the court " when it was not the meaning of " the court or a judge " means a judge in open court.]

The Annual Practice, 1945, p. 676, when commenting on the Evidence Act, 1938, says: " It is desirable to apply in chambers " but the application may be adjourned to the trial." [He referred to Or. 30, r. 2 (*d*), Or. 37, r. 1, and Or. 54, r. 12.] The court has power to delegate to the judge in chambers or master all powers vested in the court but the delegation must be by rule of court: see *In re Davidson* (1) where, however, *Smeeton* v. *Collier* (2) was misinterpreted. That delegation was effected by Or. 30, r. 2: see also the Supreme Court of Judicature (Consolidation) Act, 1925, s. 61, sub-s. 1, replacing s. 39 of the Judicature Act, 1873.

[SOMERVELL L.J. Has a rule ever been held to be ultra vires s. 61? Parliament seems to have thought that a statute was needed to change the law of evidence.]

The rule committee has not complete power to do as it likes. In *Clover* v. *Adams* (3) it was held that a judge in chambers had power to act generally in regard to matters arising in a pending action in the absence of any words depriving him of that power: see also *Baker* v. *Oakes* (4), *Dallow* v. *Garrold* (5), and *Amstell* v. *Lesser* (6), a case decided under s. 39 of the Judicature Act, 1873.

The alternative form of order might be useful as giving the trial judge a power not expressly given under the Evidence Act, 1938, except in jury cases, to reject written evidence when oral evidence has become available. [He referred also to Phipson on Evidence, 8th ed., p. 265.]

(1) [1899] 2 Q. B. 103.
(2) (1847) 1 Ex. 457.
(3) (1881) 6 Q. B. D. 622.
(4) (1877) 2 Q. B. D. 171.
(5) (1884) 14 Q. B. D. 543.
(6) (1885) 16 Q. B. D. 187.

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Horace Fenton for the defendants. It is important to keep the facts of this case in mind. The accident having taken place in 1943, the two statements were obtained in March, 1944, and affirmed after the proceedings had been commenced in 1945. Before the master there was no affidavit proving that the two American soldiers were beyond the seas, as there ought to have been. The court had no jurisdiction unless they were beyond the seas and there was no sufficient evidence of this. Further, these statements were inadmissible under s. 1, sub-s. 3, of the Evidence Act because the deponents were interested. [SOMERVELL L.J. No. They were mere witnesses.] There are two further questions: (1.) had the master jurisdiction to make his order, and (2.) ought he to have made it as being satisfied that failure to do so would cause undue delay and expense. The master had no jurisdiction to make the order having regard to the terms of s. 1 of the Act and Or. 37, r. 1. The word "court" in the Act in absence of the further words "or a judge" confers jurisdiction only on the court in banc: see *Smeeton* v. *Collier* (1) and *Abrahams* v. *Dimmock* (2). The intention is that the question whether written statements should be admitted in evidence shall be decided by the trial judge. At the most an application may be made to the court by motion or to the Divisional Court but not to the master. Taking the Act as a whole it is clearly indicated that the matter is to be dealt with in open court: see s. 1, sub-s. 5, and s. 6, sub-s. 1.

There remains the question whether, assuming the master had jurisdiction to make the order, it is one he ought to have made. It ought at least to have been conditional on the plaintiff proving at the trial that the deponents were beyond the seas.

[LORD GREENE M.R. The question is whether this court should impose any condition. If so, it would seem proper to make the statements admissible in evidence unless it be shown that the two soldiers are readily available.] Here the plaintiff had ample opportunity to obtain an order for the examination of the two soldiers while they were admittedly in the country, seeing that the plaintiff's solicitors interviewed them in July, 1945, after the action had been commenced and that it was not till the following November that they wrote to the defendants' solicitors asking them to admit the statements in evidence.

(1) 1 Ex. 457.

(2) [1915] 1 K. B. 662.

The plaintiff was guilty of great delay. [He referred to *Hollington* v. *F. Hewthorn & Co.* (1).]

C. N. Shawcross replied.

Cur. adv. vult.

June 4. The judgment of the court was read by SOMERVELL L.J., who, after stating the facts and reading the material parts of s. 1, sub-ss. 1, 2 and 3 of the Evidence Act, continued: In the first place, it appears to us quite clear that sub-s. 2 contemplates that an order may be made before the trial. The opening words and the reference to undue delay make this plain. Such an order would be an interlocutory order. The question is whether such an order can be made in chambers or must be made in open court. It was agreed that, in the King's Bench Division, if the matter could not be dealt with in chambers, it would have to come before the Divisional Court presumably on a motion. The word "court" can clearly in ordinary language bear different meanings according to the context. Considering the matter apart from authority, it is obvious, for example, that the words "an application to the "court" may, in certain contexts, clearly mean an application in chambers. In other contexts it might as clearly mean an application to the judge at the trial or otherwise in open court.

Before considering the relevant sections of the Judicature Act and the Rules of Court, it is necessary to see how the authorities stand on this question of construction. In *Baker* v. *Oakes* (2), the rule in question was one which provided that costs should follow the event "unless upon application made "at the trial for good cause shown the judge before whom "such action or issue is tried or the court shall otherwise order." No application was made at the trial and it was held that "court" did not include a judge in chambers. Brett L.J. referred to what is, no doubt, a common formula when it is intended to give jurisdiction in chambers, namely, "the court "or a judge." He also referred to the importance of the normal right to costs and clearly thought an application to the Divisional Court appropriate if the issue was not dealt with at the trial. Other cases show that there is no rigid rule. We were referred, among others, to *Smeeton* v. *Collier* (3), *Dallow* v. *Garrold* (4) and *Clover* v. *Adams* (5). In the first of those cases the question was whether a power conferred on the court could be exercised by a judge in chambers. We select two sentences from the judgment of Parke B.: "In the con-"struction of the Act we must hold that the courts may "exercise the power given to them by it in the common and "ordinary way, unless it contains something to the contrary ". . . . By the application of this principle of construction "to the present statute . . . . it seems to me it is not limited "to acts done in court" (that is, in open court), "and therefore "that my brother Platt" (the judge in chambers) "clearly "had authority to make this order." In recent years, the expression "the court or a judge" has been frequently used, and, in this expression, the "court" means a judge or judges in open court, and "a judge" means a judge sitting in chambers. We are, however, clear, both on authority and in principle, that there is no rigid rule which compels us to construe the word "court" as excluding jurisdiction exercised in chambers. Regard must be had to the context and to the ordinary practice which the legislature must be assumed to know. In the first place, interlocutory applications are normally made in chambers and not to the Divisional Court. The matter, however, does not rest there. Order 30, r. 2 (*d*), gives power to the court or a judge on the summons for directions to make orders relating to documentary evidence. This rule is in very wide terms and questions might arise if it was sought to be used to make orders, otherwise than by the agreement of the parties, which admitted evidence which was inadmissible under the common law rules of evidence as extended or modified by statute. That question does not arise here. When jurisdiction is given to the judge in chambers, the jurisdiction, with certain exceptions which are not material, can be exercised by a master by Or. 54, r. 12, made under s. 99, sub-s. 1 (*d*) of the Supreme Court of Judicature Act. We should have stated that Or. 30, r. 2 (*d*,) was in operation at the time of the passing of the Evidence Act, 1938. The general subject matter dealt with in the provisions of that Act with which we are concerned was, therefore, one which, under existing rules, could be dealt with in chambers. In our opinion, therefore, the interlocutory applications contemplated by the section of the Evidence Act, 1938, with which we are concerned, falling as they do within the words of Or. 30, r. 2 (*d*), are covered by it, and the plaintiff succeeds on the issue of jurisdiction.

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(1) [1943] 1 K. B. 567, 603.

(2) 2 Q. B. D. 171.

(3) 1 Ex. 457.

(4) 14 Q. B. D. 543.

(5) 6 Q. B. D. 622.

Mr. Fenton took two further points. The first of these was that there was no evidence that the soldiers were "beyond the

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"seas." In our opinion, this question does not arise under s. 1, sub-s. 2, of the Evidence Act, 1938, where those words do not appear. The letter which was accepted by Mr. Fenton instead of an affidavit might well be regarded as evidence of absence beyond the seas if it were necessary, but it is, in our opinion, clearly sufficient to satisfy the words of sub-s. 2. He also submitted that the soldiers were "interested persons" within s. 1, sub-s. 3. We can find no evidence of this. "Interested" clearly means personally interested in the result of the proceedings. Mr. Fenton also drew attention to the reference in the Master's order to Or. 37, r. 1. It is unnecessary to set out that order which gives power to the judge at the trial to exercise, inter alia, the powers under Or. 30, r. 2 (*d*). We think that the relevant Order is Or. 30, r. 2, but, in our opinion, it is not necessary to refer to it in the order to be made.

On the merits, Mr. Fenton relied on the delay and on other matters. We have considered his submissions, but, subject to a matter mentioned below, we think the plaintiff is entitled to an order. It is obviously of great convenience that a party should be able to know whether or not documentary evidence is admissible before he prepares for trial. If an order is refused it may, in some cases, not be worth proceeding further. He ought also to be relieved, if the facts as then known justify it, from the expense of further efforts to trace or procure the attendance of the witnesses. If he was, in all or most cases left to apply to the judge at the trial, these objects would not be attained. On the other hand, if, contrary to expectation, a witness became readily available at the time of the trial, it might be wrong that his statement should be read instead of his giving oral evidence. We put this point to Mr. Shawcross who was willing to accept a conditional order in the following terms: "That pursuant to the Evidence Act, 1938, the two written "statements exhibited to an affidavit sworn herein by William "Simpson Nicoll Harrison on the 21st day of May, 1946, be "admitted at the trial of this action as evidence tending to "establish the several facts therein respectively set out unless "it be proved or admitted at the trial of the action that the "person whose statement it is sought to read is present in this "country and available as a witness."

In these circumstances, the appeal will be allowed.

Solicitors: *Harrison, Sugden & Co.; Thompson & Co.*

H. C. G.

CUTLER *v.* WANDSWORTH STADIUM, LIMITED.

1946
May 21, 22.

Oliver J.

Betting and Lotteries — Bookmaker — Statutory obligation on owner of course to provide facilities where totalisator carried on—Alleged contravention—Whether actionable—Betting & Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 11, *sub-s.* 2.

The obligation imposed by s. 11, sub-s. 2, of the Betting & Lotteries Act, 1934, on the owner of a dog racecourse where a totalisator is in operation to " secure that . . . . there is available " for bookmakers space on the track where they can conveniently " carry on bookmaking . . . . " is one the contravention of which is actionable at the suit of a bookmaker injured thereby.

Preliminary Point of Law in an action tried by Oliver J. The plaintiff, Alfred Cutler, a bookmaker, claimed declarations, injunctions, and damages for alleged breach of statutory duty by the defendants, Wandsworth Stadium, Ld., the owners of a greyhound racecourse. His case, as pleaded, was that, as a bookmaker, he was entitled to be admitted to the racecourse for the purpose of carrying on his business; that he was entitled, in common with his fellow-bookmakers, to allocation of a space on the premises which would permit him a fair opportunity of carrying on his business in competition with the totalisator maintained by the defendants on the racecourse, and that he had been granted those facilities until March, 1944; that thereafter the defendants had required him to move from the position in which he had formerly carried on his business as a bookmaker and to take up a position behind totalisator buildings from which there was no clear view of the racing; and that the defendants' so requiring him to move was a contravention of s. 11, sub-s. 2, of the Betting and Lotteries Act, 1934 (1).

The defendants raised, among other defences including a

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

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(1) Betting and Lotteries Act, 1934, s. 11, sub-s. 1: " Notwithstanding any enactment or rule " of law to the contrary, it shall be " lawful on any licensed track " being a dog racecourse for the " occupier of the track or any person authorized by him in writing " —(*a*) to set up and keep a " totalisator, whether in a building " or not; and (*b*) on any appointed " day, while the public are admitted to the track for the " purpose of attending dog races " and no other sporting events are " taking place on the track, to " operate a totalisator so set up, " but only for effecting with " persons resorting to the track " betting transactions on dog races " run on that track on that day; " and for any person to effect " betting transactions by means of " a totalisator lawfully operated."

Sub-section 2: " The occupier " of a licensed track—(*a*) shall not, " so long as a totalisator is being " lawfully operated on the track,

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denial of the alleged contravention, the defence, by way of preliminary objection, that such a contravention was punishable as provided in s. 30 of the Act and so not actionable at the suit of a private individual.

That issue was now argued as a preliminary point of law.

Neve K.C. and *Paget* for the defendants. No action for damages lies against the defendants for breach of a statutory duty under the Betting and Lotteries Act, 1934. Where there is a statute which grants a faculty to carry on an undertaking and the statute provides a penalty for breach of duty, then the liability of the undertakers is limited to that penalty and there is no right of action vested in a person suffering damage by reason of that breach of duty: *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (1). In that case the plaintiff brought an action for damages against a waterworks company for not keeping their pipes charged as required by the Waterworks Clauses Act, 1847, whereby his premises were burnt down, but the Court of Appeal held that the statute gave no right of action to the plaintiff. So also in *Clegg, Parkinson & Co.* v. *Earby Gas Co.* (2), it was held that an action would not lie against a gas company to which the Gasworks Clauses Act, 1871, applied for damages sustained by a consumer by reason of their failure to give him a supply of gas sufficient to satisfy the requirements of the Act, and that the only remedy was to proceed for penalties under the Act. Again, in *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (3), where a vehicle on the highway was damaged as a

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" exclude any person from the " track by reason only that he " proposes to carry on bookmaking " on the track; and (*b*) shall take " such steps as are necessary " to secure that, so long as a " totalisator is being lawfully " operated on the track, there is " available for bookmakers space " on the track where they can " conveniently carry on book-" making in connexion with dog " races run on the track on that " day; and every person who " contravenes, or fails to comply " with, any of the provisions of " this sub-section shall be guilty " of an offence."

Section 30: " (1.) A person guilty " of an offence under . . . s. 11, " or under any section contained in " Part II. of this Act shall be " liable—(*a*) on summary con-" viction, to a fine not exceeding " 100*l*., and in the case of a second " or any subsequent conviction " for an offence under the same " section, to imprisonment for a " term not exceeding three months " or to a fine not exceeding 200*l*. " or to both such imprison-" ment and such fine; or (*b*) on " conviction on indictment," to heavier penalties.

(1) (1877) 2 Ex. D. 441.

(2) [1896] 1 Q. B. 592.

(3) [1923] 2 K. B. 832.

result of the breaking of the axle of a motor lorry belonging to the defendants and an action was brought for breach of a provision of the Motor Cars (Use and Construction) Order, 1904, it was held that the duty imposed by the order was a public duty only to be enforced by the penalty imposed for a breach of it and did not give rise to an action for damages. In the present case the defendants are in the same class as gasworks and waterworks, that is to say, in what may be called the faculty class, since they are authorized by the Betting and Lotteries Act, 1934, to do something which it would otherwise be unlawful for them to do: see the Preamble to the Act which describes it as an Act, inter alia, to authorize the establishment of totalisators on dog racecourses. It is only where an Act imposes a duty instead of granting a faculty that there is prima facie an obligation to compensate those injured by a breach of the duty.

Hemmerde K.C., *Platts Mills* and *P. J. O'Connor* for the plaintiff. The rule relied on by the defendants only applies where the statute is for the benefit of the public generally. It does not apply where the statute confers a benefit or gives authority to an individual or a particular class of individuals. Here the statutory provision is for the benefit of the occupiers of dog-racing tracks, and the plaintiff is therefore not precluded from claiming damages for breach of that provision. There are cases where a penalty is of so particular a nature that it is obviously intended to be the only remedy for the breach: *Pasmore* v. *Oswaldtwistle Urban District Council* (1). [*Parkinson* v. *Garstang & Knott End Ry. Co.* (2) referred to.] In the present case, there being nothing to suggest that these penalties are the only sanction for breach of the duty in question, it follows that there is a civil remedy for that breach. The text books bear that out: see, for a modern review of the law on this subject, Winfield on Torts, (3rd ed.), p. 153. In *Phillips* v. *Britannia Hygienic Laundry Co., Ld.* (3) affirmed by the Court of Appeal (3), McCardy J., gave a first glimpse of the doctrine laid down by du Parcq L.J., sitting as a judge of first instance in *Badham* v. *Lambs, Ld.* (4), where he held that an action lay at the suit of a person injured by a breach of the duty imposed by the Motor Vehicles (Construction and Use) Regulations, 1940, not to sell a car with defective brakes. If a new right is established by a statute and a particular remedy is made appropriate by the statute, the jurisdiction of the court to protect that right by injunction cannot be excluded: see Kerr on Injunctions (6th ed.), p. 9 and *Cooper* v. *Whittingham* (1). Wherever an injunction will lie an action must lie, too. [*Hayward* v. *East London Waterworks Co.* (2), *Attorney-General* v. *Sharp* (3), and *Stevens* v. *Chown* (4) referred to.]

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(1) [1898] A. C. 387

(2) [1910] 1 K. B. 615.

(3) [1923] 1 K. B. 539.

(4) Aute p. 45.

Neve K.C., replied.

OLIVER J. I have come to the conclusion, on this rather difficult point, that the action does lie. [His Lordship read ss. 11 and 30 of the Act and continued:] It is true that the penalties imposed by s. 30 are very heavy and that the section even contemplates a penalty on indictment. The argument for the defendants is that those penalties and the general scope of the Act clearly show that the legislature intended that penal section to be the only remedy in respect of a breach of s. 11.

This question, whether a private person can bring an action in respect of a breach by the defendant of a statutory provision where penalties for that breach are provided, has been much debated in the courts, and it is not easy to reconcile the decisions, or to distinguish the real principle underlying them.

This principle does, however, appear to emerge: where the legislature has provided for the protection of a specified class of the public, then, even though it has also provided penalties in respect of a breach of the enactment, members of that specified class who suffer injury from such a breach have a right of action. That principle seems consonant with all the authorities.

The converse proposition is not, of course, true: it is not true that, where no specified class, but only the public as a whole, is intended to be protected, a particular section of the public can never have a right of action; in some cases it has been held that they have. But I know of no authority, and counsel were unable to cite any, which has decided that, where a specified class was intended to be protected by the legislature and the protecting enactment was broken, members of that specified class had no right of action.

It is unnecessary to consider all the cases—they are too well-known—but if that proposition is right, then it is only necessary to decide whether this section was intended to protect a specified class of the community. Just as factory hands, an enormous class running into millions of persons, who receive protection under the Factories Acts, can sue in respect of any breach of those Acts, so, in my opinion, can bookmakers under this Act: they ply their trade on the dog tracks and are a specified class of the public. It seems to me that s. 11, sub-s. 2, was intended to protect their rights. They were members of a trade before the statute was passed. The statute legalized a new form of betting by machine, and it is plain that the legislature meant, while permitting the use of the machine and obviously doing considerable harm to the bookmaking trade, for they were authorizing a new and very formidable competitor, to see that the members of that trade were given a fair chance to compete with the machine. In order to achieve that, they decided to provide, not that every dog track is to have a machine, but that if a track does have a machine the owners of the track are to treat the bookmakers fairly. That, I think, is the object of the enactment.

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(1) (1880) 15 Ch. D. 501, 506, 507.

(2) (1884) 28 Ch. D. 138.

(3) [1931] 1 Ch. 121.

(4) [1901] 1 Ch. 894, 904.

I am not assuming that the defendants as owners of the track have treated the bookmakers unfairly, for I have not yet heard the case; but, for the purposes of this preliminary judgment, I have to assume that the bookmakers have been treated unfairly. If so, they have, in my opinion, a right of action, and this action will now proceed.

Preliminary objection dismissed.

Solicitors for the plaintiff: *S. Seifert & Co.*

Solicitors for the defendants: *Wilkinson, Howlett & Moorhouse.*

BOWMAKER, LIMITED v. WYCOMBE MOTORS, LIMITED.

1946
May 30.

Lord Goddard C.J., Humphreys and Singleton JJ.

Lien—Motor car—Hire-purchase agreement—Hirer in default—Agreement duly terminated by owners—Car subsequently left by hirer at defendants' garage for repairs—Artificer's lien claimed by defendants—Interpleader issue.

The owner of a motor car who lets it to another person on a hire-purchase agreement and puts the hirer in possession of the vehicle

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authorizes him to use it in all manners necessary for his enjoyment, but that authorization is ended by the termination of the agreement. Therefore the hirer is unable to confer on repairers an artificers' lien for work executed by them on the hirer's instructions after the hire-purchase agreement has been duly terminated.

APPEAL from order of Master Baker.

Interpleader issue.

On August 1, 1945, the plaintiffs in the issue, Bowmaker, Ld., entered into a hire-purchase agreement with one Payne to let to him a motor car on hire with a view to ultimate purchase. One of the terms of the agreement provided that the hirer was "to keep the vehicle in good order, repair and condition, and "to be responsible for all risks of whatsoever kind, fire included. "If and whenever any repairs are required they shall be carried "out at the expense of the hirer, provided that the hirer shall "not have or be deemed to have any authority to pledge "the owners' credit for the repair of the vehicle or to create a "lien thereon in respect of such repairs or for any other purpose "or thing whatsoever." The agreement also provided that if the hirer made any default the owners could forthwith retake possession of the vehicle and terminate the agreement, and further, that "A demand by the owners for the return of the "vehicle given orally or by their duly appointed representative "or in writing left at or sent by prepaid post addressed to the "hirer at his last known address or the address set out in the "preamble to this agreement shall be sufficient notice of "termination of this agreement by the owners." On December 12, 1945, 43*l*., part of the hire being in arrear, the plaintiffs terminated the agreement by letter of that date, and on December 19 they issued a writ against Payne for the arrears and for the return of the motor car. On December 27, Payne, who had disregarded the notice to terminate the agreement, and who had been involved in an accident, left the car at the garage of the defendants, Wycombe Motors, Ld., for repairs. On January 30, 1946, judgment was obtained by the plaintiffs who were given leave to proceed, and on March 1, the sheriff of Buckingham levied execution at the defendants' garage. The defendants claimed to hold the car on an artificer's lien for the repairs, amounting to 115*l*. 15*s*., and an interpleader was filed by the sheriff. On April 3 the issue was heard by the master, who on April 10 made an order rejecting the claim of the defendants to a lien. The defendants appealed.

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BOWMAKER, LD. *v.* WYCOMBE MOTORS, LD.

Stephen Chapman for the defendants. The point for decision is whether a motor car repairer has a lien in respect of repairs executed, which is valid against the hiring-owner of the car when at the time of the repairing the hire-purchase agreement has been terminated. It is submitted that the ostensible or apparent authority which operates to enable the hirer to give the repairer a lien derives from the fact that the hiring-owner has put a person in possession of the car and led everybody to assume that that person is the actual owner. That ostensible authority continues until notice of the termination of the hire-purchase agreement is given to those concerned. So long as the obligation to keep the car in repair and hand it back in repair exists the party at risk is the hire-purchase company. They hold out their client as the owner, and the fact that he is only the hirer cannot affect those who rely on the apparent ownership with which the hirer has been vested. It is only just that Bowmaker, Ld. should be the parties at risk. They are getting the benefit of the repairs executed by Wycombe Motors, Ld., and unless there exists an artificer's lien they will get that benefit without payment.

[He referred to *Singer Manufacturing Co.* v. *London & South Western Ry. Co.* (1); *Keene* v. *Thomas* (2); *Green* v. *All Motors, Ld.* (3); and *Albemarle Supply Co., Ld.* v. *Hind* (4).]

Longland K.C. and *Stenham* for the plaintiffs were not called on.

LORD GODDARD C.J., having stated the facts, continued: In my opinion the master's decision that the lien could not prevail was clearly right. The position was that at the date when this car was left at the garage Payne had no right or title to it, he was holding the car against the will of the true owners. First of all, let us see what the position is with regard to liens generally, created on the property of what I may call third persons. The first case to which I may refer is the well-known decision in *Buxton* v. *Baughan* (5), in which the facts were these: " A. put " a phaeton into the possession of M. for him to paint it and " paid M. beforehand for the painting. M. never painted it, " but placed it on the premises of B., where it stood three " months: Held, that B. had no lien on the phaeton for his charge " for the standing of it, unless the jury were satisfied that M.

(1) [1894] 1 Q. B. 833.
(2) [1905] 1 K. B. 136.
(3) [1917] 1 K. B. 625.
(4) [1928] 1 K. B. 307.
(5) (1834) 6 C. & P. 674.

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"placed it there by the authority of A.". Alderson B., summing up to the jury, stated the law in this way: "The "defendant cannot set up a bargain made by Mackenzie, "unless Mackenzie had authority from the plaintiff to make "such a bargain. If you trust your goods into a "man's possession, and he makes a bargain about them without "your authority, you are not bound by that bargain, and may "reclaim the goods. The fact that the plaintiff's servant was "three months before he could find out where the phaeton was "does not look much like the plaintiff having authorized a "bargain to be made for the defendant to keep it at hire. "A man has no right to keep my property, and charge for the "standing of it, unless there was a previous bargain between "him and me, or between him and some agent authorized "by me." So the lien in that case failed. With regard to hire-purchase agreements the law has been extended, as I understand it, to this extent, that if the owner of a chattel lets it to another on a hire-purchase agreement, he puts the hirer into possession of it with authority to use it as though it were his own during the time that the hiring exists, and to use it in all manners necessary for his enjoyment. Accordingly, he may deal with it in such ways as are necessary for its use and enjoyment.

In *The Singer Manufacturing Co.* v. *The London & South Western Ry. Co.* (1), a man who was in possession under a hire-purchase agreement of a Singer sewing machine placed it in a railway cloak-room during the time that the hiring was in existence and, the hiring having come to an end, the owners of the machine claimed it from the London & South Western Ry. Co., who set up a warehousemen's lien. Collins J., in giving his judgment in that case put it in this way: "I think "in this case the lien may also be rested on another ground; "and that is, that the person who deposited this machine was, as "between himself and the owner of it, entitled to the possession "of it at the time he deposited it. He was entitled to it under "a contract of hire, which gave him the right to use it, I "presume, for all reasonable purposes incident to such a "contract, and among them, I take it, he acquired the right to "take the machine with him if he travelled, and to deposit it "in a cloak-room if he required to do so. In the course of that "reasonable user of the machine, and before the contract of "bailment was determined, he gave rights to the railway com-

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(1) [1894] 1 Q. B. 833.

"pany in respect of the custody of it. I think those rights must "be good against the owners of the machine, who had not "determined the hire-purchase agreement at the time that "those rights were acquired by the railway company." So, too it has been held in the cases to which our attention has been called, more especially *Green* v. *All Motors, Ld.* (1), and *The Albemarle Supply Co., Ld.* v. *Hind & Co.* (2), that in the case of a motor car where it is necessary that the motor car should be kept in running condition and repair during the time the hire-purchase agreement is current and valid, the hirer has a right to take it and get it repaired and, if he does so the repairer can exercise an artificer's lien on it, because at the time when the motor car was left with him he, the hirer, had the right, whether you call it by implied authority or by legitimate authority, to use that car in all reasonable ways, and among those ways was a right to get the car repaired and kept in running order. Therefore he was placing it with the repairer with the implied consent of the owner and the artificer's lien on that account will prevail against the owner. These cases have also held, and quite understandably, that an arrangement between the owner and the hirer that the hirer shall not be entitled to create a lien, does not affect the repairer. A repairer has a lien although the owner has purported to limit the hirer's authority to create a lien in that way. That seems to me to depend upon this: Once an artificer exercises his art upon a chattel, the law gives the artificer a lien upon that chattel which he can exercise against the owner of the chattel if the owner of the chattel has placed it with him or has authorized another person to place it with him. If I send my servant with my chattel to get it repaired, the artificer will get the lien which the law gives him on that chattel although I may have told my servant that he is not to create a lien. The fact is that the lien arises by operation of law because the work has been done on the chattel.

In this case the authority to the hirer had been duly determined under the terms of the agreement, and at the time when the hirer took the car to the Wycombe Motors, Ld., he had no more right to the car than a thief would have. He had been placed in possession of the car. The consent of the owner of the car to the bailment had ceased, and if the hirer converted it to his own use by selling it, it seems to me that he would have been guilty of larceny, and, as has been pointed out

(1) [1917] 1 K. B. 625.

(2) [1928] 1 K. B. 307.

during the course of the argument, every time he drove the car he was driving it without the consent of the owner and was committing an offence under the Road Traffic Act. In these circumstances, it seems to me impossible to say that Wycombe Motors, Ld., can establish and insist on a lien against the owners of the car, who was no party to placing it with them. Indeed, it was placed with them in violation of their rights. The case is no doubt of some importance to people who finance hire-purchase transactions or let out cars on hire-purchase terms, and it is also of importance to garage proprietors who do repairs. It is well known that a very large number of cars are on hire-purchase at the present time. It is also very well known, unfortunately, that a great many cars are stolen at the present time ; and it is one of the risks which a garage proprietor who does repairs incurs—one of the risks of his trade—that he may find, either because a hire-purchase agreement has been terminated or for some other reason, whether by reason of a theft or not, the person who brings the car has no right to deposit the car for repairs. He may find he has no lien and cannot enforce his rights against the car or recover the money from the thief or person in illegal possession of the car. It seems to me impossible to hold that the common law lien can prevail against the owner of the car when the person who placed the car for repairs had no right so to place it. In my opinion the master's decision was right, and this appeal fails.

HUMPHREYS J. I agree, and it is only because the case has been said to be of some importance that I add that in my opinion the proposition contended for by Mr. Chapman has been decided in each of several authorities all of which are binding on us. I turn particularly to the judgment of Bankes L.J. in the case of *Green* v. *All Motors, Ld.* (1), in which he observed as follows : " In a previous case "—that is, *Keene* v. *Thomas* (2) —" the point as stated by Lord Alverstone was : ' Whether " ' the man who made the bargain with the repairer had " ' authority from the plaintiff to make such a bargain.' " That is the first point to be decided. The question, therefore, " is whether on October 31, when Price "—for whose name Payne may be substituted—" made the bargain with the " defendants for the repair of the motor car he had authority " from the plaintiff to do so. In my opinion, he clearly " had authority unless the plaintiff had determined the

(1) [1917] 1 K. B. 625, 632.

(2) [1905] 1 K. B. 136, 137.

"hire-purchase agreement before that date." Scrutton L.J., in agreeing with that view, observed: "Accordingly the hirer "had by contract a duty as well as a right, until the hire was "terminated, to have the car repaired, with the ordinary "consequence of giving the repairer a lien on the car for the "proper cost of the repairs." He then posed the question for decision in that case as being: Had the bailment been determined when the order to do the repairs was given by the hirer? On the facts of this case it seems to me to be clear beyond argument that at the time when the order to do the repairs was given there was no authority in Mr. Payne to give any such order.

SINGLETON J. I am of the same opinion. Under the hire purchase agreement the owners had power in certain events to terminate the hiring immediately. They did that on December 12 by notice in writing. From that time the hirer had no right to use the car, still less had he a right to pledge anyone else's credit for the incurring of expense upon the car. The authorities cited to us by Mr. Chapman on behalf of the defendants show that all of them really are decided upon the question whether or not the hirer had authority. In the case of *Keene* v. *Thomas* (1), it was shown that in the circumstances of that case the hirer had authority to send the car to be repaired and therefore the defendant's lien was good not only against the hirer but also against the plaintiff. In the circumstances of the present case the hirer had no authority to send the motor car to be repaired, and the claim to a lien accordingly fails. I would only add this, that the argument for the defendants seems to me to be an effort to extend the right to a lien beyond anything which has ever been contemplated. That is shown, as I think, by the two passages just referred to by Humphreys J. in the judgments of Bankes L.J. and Scrutton L.J. in the case of *Green* v. *All Motors, Ld.* (2).

Appeal dismissed.

Solicitors for appellants: *L. Bingham & Co.*

Solicitors for respondents: *Peacock & Goddard, for W. Parkinson Curtis, Bournemouth.*

(1) [1905] 1 K. B. 136, 137. (2) [1917] 1 K. B. 625, 632.

A. W. G.

1946
May 8.

Lord Goddard C.J., Humphreys and Singleton JJ.

EVANS *v.* ROGERS.

Food and Drugs—Milk—Sampling—Sale to Milk Marketing Board—"Place of delivery"—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 68, *sub-s.* (4).

For the purposes of both s. 68, sub-s. 4 of the Food and Drugs Act, 1938 (1), and the contract whereby a producer sells all his milk to the Milk Marketing Board, the "place of delivery" is the place where delivery takes place by the producer to the person to whom he is directed by the board to deliver his milk.

A farmer who, in pursuance of his contract with the Milk Marketing Board, sold them all the milk produced at his farm, by direction of the board delivered the milk daily to G., a bulk purchaser of milk from the board, who collected it in his lorry from the "farm collecting point" as defined in the contract. The farmer was unaware that a diversion order had been made by the board whereby such of his milk as was surplus to G.'s requirements was sent on to another consumer, and that in pursuance of that order his milk was in fact sent on by road from G.'s premises. A sample of the farmer's milk taken at the premises of that other consumer was found to contain added water. Justices having dismissed an information alleging contravention by the farmer of s. 24, sub-s. 1 of the Act of 1938 by virtue of the adulteration,

Held, that the "place of delivery" of the milk was the farm collecting point; that the sample had therefore not been taken in compliance with s. 68, sub-s. 4; and that the information was accordingly rightly dismissed.

Watson v. *Coupland* (1945) 109 J.P. 90, discussed and distinguished.

CASE STATED by Montgomeryshire justices.

At a court of summary jurisdiction sitting at Llansantffraid, Montgomeryshire, an information was preferred by the appellant, Evan Walter Evans, a food-and-drugs inspector, against the respondent, John Rogers, a farmer, alleging that he on October 2, 1945, at Llandysilio unlawfully sold for human consumption to the Milk Marketing Board milk to which an addition of water had been made, contrary to s. 24 (1.) of the Food and Drugs Act, 1938.

At the hearing of the information, the following facts were proved or admitted: the appellant inspector was the duly

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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(1) By s. 68, sub-s. (4) of the Food and Drugs Act, 1938:—"A sampling officer, or an inspector of the Minister, may take samples of milk at any dairy, or at any time while it is in transit, or at the place of delivery to the purchaser, consignee or consumer . . ."

authorized agent of Montgomery County Council, properly authorized to institute the proceedings. On October 2, 1945, a lorry arrived at the Four Crosses Creamery, Montgomeryshire, conveying milk churns. The appellant took samples from seven churns on the lorry, which churns bore a label on which was written " Rogers, Grove, Forden, seven churns, seventy-and-a-" quarter gallons." The appellant took about one and a half pints from each of the seven churns, after having first thoroughly mixed the milk in them.

The one and a half pints taken from each churn was separately divided into three equal parts. All the formalities prescribed by the Act of 1938 having duly been observed, the appellant wrote to the respondent on October 10, 1945, informing him that analysis had shown that one of the samples contained twelve per cent. of added water.

The respondent was under contract to supply milk to the Milk Marketing Board, and the milk in question was to be used for human consumption. His duty under the contract as a producer was to deliver the milk daily to such places and consignees as the board directed.

One Robert William Griffiths was a bulk purchaser of the milk from the board. Under a diversion order from the board, milk surplus to the requirements of Griffiths at Forden was re-directed to the Four Crosses Creamery. The respondent's milk was, and had been for many years past, under the direction of the board, supplied to Griffiths, who was also a haulage contractor conveying milk on behalf of the board. On the day in question the seven churns of milk were collected by Griffiths' lorry driver at the respondent's farm, and the contents, being treated as surplus milk by Griffiths, were conveyed by a circuitous route to the Four Crosses Creamery. The distance between the farm and that creamery was thirty miles.

It was contended for the appellant that, owing to the existence of the diversion order, the point of delivery of the milk was the Four Crosses Creamery. It was contended for the respondent that the sample was taken at a point other than the point of delivery, and after the milk had passed out of his control.

The justices held that the sample had been taken after delivery, and dismissed the information, but stated this case.

Gattie for the appellant-inspector. *Watson* v. *Coupland* (1) is an authority for the proposition that the sale in this case took place at the Four Crosses Creamery. Admittedly it is not directly in point here, where the question for the court is what is the place of delivery having regard to s. 58, sub-s. 4, of the Act of 1938 which deals with sampling. It is, however, submitted that the place of delivery, also, was the Four Crosses Creamery where the samples were duly taken. [LORD GODDARD C.J. The word "consumer" is not defined in the Act, but surely it must be the purchaser ?] The Milk Marketing Board are not the consumers. They simply pass the milk on. The Four Crosses Creamery, or the person there who makes use of the milk, is the consumer. The milk was in transit from the moment when it left the farm collecting point until that at which it reached that creamery. [SINGLETON J. Why are there not three places of delivery here ?] If delivery has taken place at the farm collecting point, then it cannot, it is submitted, be material whether the milk ends up with Griffiths or at the Four Crosses Creamery.

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(1) (1945) 109 J. P. 90.

There is nothing in the case stated to show that the respondent knew of the diversion order ; but, it is submitted that it was not necessary, in order that delivery should take place at the Four Crosses Creamery, that he should know that.

The respondent did not appear.

LORD GODDARD C.J. This case raises a question of some difficulty by reason of the form of contract which every milk producer is now obliged to make with the Milk Marketing Board. As has been pointed out before in this court, it is one which may inflict considerable hardship on the farmer because he is bound to sell to the board and to nobody else. He has no voice in the form of contract ; the board prescribe it, and they are the only possible purchasers. If something takes place which, it is shown, the farmer could not control in any way, the court should not find him guilty of any offence unless the Food and Drugs Act, 1938, compels it.

The point raised in this case differs from that raised in *Watson* v. *Coupland* (1). The question there was where the sale took place, and the court expressly left open the question, raised in this case, where the place of delivery might be for the purpose of s. 68 of the Act of 1938. The question here is not where the sale took place, but whether or not the sample was taken in accordance with the terms of the Act. The prosecution relied on the sample and on the analysis made of it. It is,

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(1) 109 J. P. 90.

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therefore, necessary for them to show that the sample was taken in accordance with the terms of the Act of 1938. [His lordship read s. 68, sub-s. 4.] Section 100 defines transit as including "all stages of transit from the dairy, place of manufacture or "other source of origin, to the consumer." It is agreed that there is no question of the sample having been taken at the respondent's dairy. Therefore, in order that it should have been taken regularly, it must have been taken either while the milk was in transit or at the place of delivery. Under the contract with the Milk Marketing Board, the producer sells all his milk to the board. By cl. 3 of the contract, "the "producer shall deliver the milk daily to such places and con-"signees as the board directs." It is obvious that under that clause the board can give such directions as they please as to places and consignees; but if the board only direct the farmer to deliver milk to a particular consignee without stating the place where it is to be delivered, the farmer will fulfil his contract if he delivers to the consignee who chooses to fetch the milk. The contract further provides that "the producer shall permit "the board to arrange and pay for transport of the milk from "the farm collecting point to the place of delivery." The farmer is required to have his milk ready at the "farm collecting "point," which expression is defined. By cl. 5, "subject to "the provisions of cl. 9 hereof, the property and risk in the "milk will pass to the board at the place of delivery when the "milk is unloaded from the vehicle by which it is transported, "or in the case of railborne milk at the time when it is made "available by the railway company for collection by the "consignee." *Watson* v. *Coupland* (1) really depended on that clause, and the court held that the sale took place and was complete when the milk arrived at the place of delivery, where it was unloaded from the vehicle by which it was transported.

[Having stated the facts, his Lordship continued :] It seems to me, in the first place, that the place of delivery need not necessarily be the place where the property passes. Where the property passes under this contract was decided in *Watson* v. *Coupland* (1), where Humphreys J. said (2) : "From some "points of view the question where the delivery took place "may be material, but for the purposes of this case it is "absolutely immaterial, because what has to be considered is "not where the milk was delivered from A to B but "where the sale took place." Croom-Johnson J., said

(1) 109 J. P. 90. (2) Ibid. 92.

much the same. The court left open the question where the place of delivery was. In my opinion, the place of delivery for the purpose of s. 68, sub-s. 4, the Act of 1938, and, indeed, under this contract, is the place where the delivery to the purchaser takes place under the direction of the Milk Marketing Board. The farmer is to deliver to the person to whom he is told to deliver, and at the place specified, if it is specified. There is no suggestion here that the respondent was told to deliver at any particular place. He was told to deliver to Griffiths, who took delivery of the milk at the farm collecting point. It may be, though I do not so decide, that it could be argued successfully, that delivery in fact took place at Griffiths' place of business. Griffiths may act in a dual capacity—as a haulage contractor to the board and a person entitled to delivery of milk from the farmer. It is unnecessary to consider that because the sample of milk was not taken at Griffiths' place of business : it was taken at the place, namely, the Four Crosses Creamery, to which Griffiths delivered the milk under an order which the board had served on him.

It seems to me that, in these circumstances, the place of delivery of the milk was the farm collecting point where Griffiths took delivery. We are, I think, relieved from having to consider whether this sample was taken in course of transit because, once the milk was delivered to Griffiths and Griffiths took delivery of it, the question whether the milk was in transit does not arise for the purpose of this case ; for it cannot be said that the milk was any longer in transit once Griffiths, as purchaser, had taken delivery of it. In my opinion, before the sample can be used in evidence against the respondent farmer, it must be shown that it was taken at the place of delivery, which was the farm collecting point for this purpose. We are not considering the question whether the property passed there. As the sample was not taken there, it follows that it was not taken in accordance with the section, and, accordingly, the justices were right in dismissing the information.

HUMPHREYS J. I agree. The point in this case might, probably, have been raised on the facts in *Watson* v. *Coupland* (1) ; but it was not. The question where the delivery took place was expressly left open by the court. On the peculiar facts of this case, I agree with the result proposed.

(1) 109 J. P. 90.

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SINGLETON J. I am of the same opinion. I think that it is greatly to be regretted that the Milk Marketing Board cannot adopt a form of contract which will work more satisfactorily. Everyone is anxious that adulteration of milk by farmers or by others should be severely dealt with when detected, but this contract, which has been in operation for some years now, is so difficult to interpret that a farmer's life is made far from easy.

As to the facts of the case I would add this: Griffiths was a bulk purchaser of milk from the board. The respondent's milk was, and had been for many years past, under the direction of the board, supplied to Griffiths. The farmer, under contract, had to deliver the milk daily to such places and consignees as the board directed. Surplus milk was dealt with by a diversion order, and on the day in question the contents of the churns were treated as surplus and conveyed by a circuitous route to the Four Crosses Creamery. There is nothing to show that the respondent knew anything of that diversion order or that the milk was in fact going to that creamery. The submission on behalf of the appellant was that, having regard to the existence of the diversion order, the point of delivery of the milk was the Four Crosses Creamery. The justices rejected that submission, and I am satisfied that there is no ground upon which we can say that they were wrong in law in so doing.

Appeal dismissed.

Solicitors for the inspector: *Sharpe, Pritchard & Co., for P. E. White, Welshpool.*

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Apr. 10, 11; *May* 10.

Scott, Morton and Tucker L.JJ.

Husband and wife—Wife's funeral expenses—Payment by wife's executors — Claim against husband for repayment — Liability of husband—Common law rule—Effect of modern legislation—Married Women's Property Act, 1882 (45 & 46 *Vict., c.* 75), *s.* 1, *sub-s.* 1—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 32, *sub-s.* 1, *s.* 33, *sub-ss.* 1, 2, *and s.* 34, *sub-s.* 3—*Law Reform (Married Women and Tortfeasors) Act,* 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 1, *s.* 2, *sub-s.* 1.

Where a married woman dies leaving an estate sufficient to pay for her funeral expenses her husband is no longer liable to pay those expenses. The common law rule which prior to 1883 imposed the obligation on a husband was based on the then status of a wife and her limited power to make a will. By the combined effect of the Married Women's Property Act, 1882, and the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman is now placed, with regard to the ownership and disposition of property, in the same position as a feme sole or a man, and the Administration of Estates Act, 1925, applies equally to her estate and to that of a man. The common law rule is therefore no longer applicable.

Quaere : whether the husband is still liable if the wife leaves no, or insufficient, estate.

APPEAL from judge of Conway county court.

The plaintiffs in the action, Harold Wilmot Rees and his wife Jean Rees, the brother-in-law and sister of Mrs. Gwen Roberts Hughes, wife of the defendant, John Roberts Hughes, sued the defendant for a sum of 51*l*. 15*s*. in respect of payments which they had made as executors of the will of Mrs. Hughes. Of the sum claimed 32*l*. 17*s*. 6*d*. was for the funeral expenses of Mrs. Hughes and the balance of 18*l*. 7*s*. 6*d*. for medical and nursing services in the lady's last illness. Mrs. Hughes died in the house of the plaintiffs, where she had been residing for several months prior to her death. She left considerable property, both real and personal, the whole of which she disposed of, leaving the residue to members of her family, but her will contained no directions to her executors to pay her debts, funeral and testamentary expenses. The defendant disputed the claim, but the county court judge held that in the absence of any direction as to payment in the wife's will the funeral expenses were, under the common law rule, the husband's liability, and that he was also liable for the medical and nursing services as expenses necessarily and reasonably incurred and of which the husband must have been aware. He gave judgment for the sums claimed. The defendant appealed.

Sutton K.C. and *D. E. Evans* for the husband. It is a rule of law that if a person dies possessed of property, that property must bear the costs of his funeral. This is an obligation imposed by law and is quite independent of any provision in the will of the deceased. It is therefore the duty of the executor to bury the deceased and he can recover the reasonable funeral expenses from the estate, in priority to all other debts and charges, including a debt due to the Crown, even if the estate is insolvent : Blackstone's Commentaries, 10th ed., Bk. II.,

p. 508, *Green* v. *Salmon* (1), *Edwards* v. *Edwards* (2), *R.* v. *Wade* (3), *Sharp* v. *Lush* (4), *In re Walter* (5), *Williams* v. *Williams* (6); and if for some adequate reason a stranger undertakes this duty, he may recover the expense from the executor, at any rate if he has assets, or even recoup himself from the assets if he happens to have any in his hands, *Tugwell* v. *Heyman* (7), *Rogers* v. *Price* (8).

This rule could not apply at common law in the case of a woman dying covert, for her personalty belonged to her husband and she was incapable of disposing of it by will, except with his consent, and if she attempted to do so her will was a mere nullity and not admitted to probate, *Willock* v. *Noble* (9). It is therefore not surprising that in these circumstances the law imposed the duty of burying her on her husband; and in this case, too, if a stranger properly undertook this duty he could recover the expenses from the husband, *Jenkins* v. *Tucker* (10), *Ambrose* v. *Kerrison* (11), *Bradshaw* v. *Beard* (12).

A married woman could, however, make a will disposing of her separate estate or its savings, but the separate estate was purely the creation of equity and equity could make its own rules about it. One of the rules was that it would not allow the husband to throw on that estate the expense of his discharging his duty of burying her, and her executor was not under any liability to do so, and if he did, he could recover the expenses, like any other volunteer, from the husband: *Bertie* v. *Chesterfield* (13), *Gregory* v. *Lockyer* (14). If the wife expressly directed her executor to pay her funeral expenses, this was regarded not as discharging her husband from his common law duty to bury her and imposing that duty on her executor, but as a gift to the husband of the expenses incurred by him in performing that duty, *Willeter* v. *Dobie* (15), and if she appointed her husband executor he could retain those expenses out of her estate, even if the will contained no directions to pay them, *In re M'Myn* (16). No doubt the learned county court judge had this equitable rule in mind when he said that in the absence of any direction as to the payment of funeral expenses in the will, this is the husband's liability. But that rule is no longer applicable. The very conception of the separate estate of a married woman no longer exists, and the combined effect of the Married Women's Property Act, 1882, s. 1 (now repealed and replaced by the Law Reform (Married Women and Tortfeasors) Act, 1935) the Administration of Estates Act, 1925, s. 32; s. 33, sub-s. 2; ss. 34, 45 and 46, and the Act of 1935 (1), is to place a married woman, with regard to the ownership and disposition of property, in exactly the same position as a feme sole, that is to say, as a man, and she has no more power to relieve her estate of the liability for her funeral expenses which the law imposes on it

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(1) (1838) 8 Ad. & E. 348.
(2) (1834) 2 C. & M. 612, 615.
(3) (1818) 5 Price 621.
(4) (1879) 10 Ch. D. 468, 472.
(5) [1929] 1 Ch. 647, 654–5.
(6) (1882) 20 Ch. D. 659, 664–5.
(7) (1812) 3 Camp. 298.
(8) (1829) 3 Y. & J. 28.
(9) (1875) L. R. 7 H. L. 580, 589–90, 596, 603.
(10) (1788) 1 H. Bl. 90.
(11) (1851) 10 C. B. 776.
(12) (1862) 12 C. B. (N. S.) 344.
(13) (1722) 9 Mod. 31, 32.
(14) (1821) 6 Madd. 90.
(15) (1856) 2 K. & J. 647.
(16) (1886) 33 Ch. D. 575.

(1) Married Women's Property Act, 1882. Section 1, sub-s. 1: "A married woman shall, in "accordance with the provisions "of this Act, be capable of acquiring, holding and disposing by "will or otherwise, of any real or "personal property as her separate "property, in the same manner "as if she were a feme sole, without the intervention of any "trustee."

Administration of Estates Act, 1925. Section 32, sub-s. 1: "The real and personal estate, "whether legal or equitable, of a "deceased person, to the extent "of his beneficial interest therein, "and the real and personal estate "of which a deceased person in "pursuance of any general power ". . . . disposes by his will, are "assets for payment of his debts "(whether by specialty or simple "contract) and liabilities, and any "disposition by will inconsistent "with this enactment is void as "against the creditors . . . ."

Section 33, sub-s. 1: "On the "death of a person intestate as to "any real or personal estate, such "estate shall be held by his "personal representatives" . . . . (a) . . . . to sell.

Sub-section 2: "Out of the "net money to arise from the "sale and conversion . . . . "and out of the ready money "of the deceased . . . . the "personal representatives shall "pay all such funeral, testamentary and administration "expenses . . . ."

Section 34, sub-s. 3: "Where "the estate of a deceased person "is solvent his real and personal "estate shall, subject to rules "of court and the provisions "hereinafter contained as to "charges on property of the deceased, and to the provisions, "if any, contained in his will, "be applicable towards the discharge of the funeral, testamentary and administration expenses . . . ."

Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1: "Subject to the provisions of "this part of this Act, and subject, "as respects actions in tort between husband and wife, to the "provisions of section twelve of "the Married Women's Property "Act, 1882, a married woman shall "—(*a*) be capable of acquiring, "holding, and disposing of, any "property . . . . in all respects "as if she were a feme sole."

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than a man has. The fact, therefore, that in this case she abstained from directing her executors to pay her funeral expenses, is immaterial: her estate remains liable for them and the executors can only discharge those expenses out of her estate and cannot recover them from her husband.

As regards the medical and nursing expenses, there is no evidence that the wife in fact pledged her husband's credit, even if she had authority to do so, which is by no means certain, or that the creditors ever gave credit to the husband. On the contrary, they presented their accounts to the wife's executors, who paid them without question and voluntarily. Money paid in such circumstances cannot be recovered.

Gerald Gardiner for the executors. Apart from public bodies and their officers there are four classes of persons upon whom the law imposes an obligation to bury deceased persons. At the basis of that obligation is public policy, and the law therefore imposes this duty in order to encourage the burial of dead bodies. It is not founded on contract. The four classes are (1.) executors, (2.) parents, in respect of deceased infant children, (3.) husbands and wives in respect of one another and (4.) householders in respect of bodies lying in their houses. Only on the first three does the law impose a financial obligation. There is no authority as to how these classes stand in relation one to another, but it is submitted that although the executors of a deceased married woman may now be liable to pay her funeral expenses, the liability of the husband is the primary liability and the executors can recover from him any sum which they have been called upon to pay. The reason why executors are held liable is to encourage others to bury dead bodies with the knowledge that they can look to the executors for repayment of the expenses incurred: see *Rogers* v. *Price* (1). In the case both of the husband and of the executor the obligation would appear to be based on the same principle, viz., common decency and the enforcement of a moral duty. The courts of equity, even where they allowed in special cases the funeral expenses of a wife to be borne by her separate estate, were careful to emphasize that the liability for those expenses was on the husband. The only change in the law that has resulted from modern legislation is that whereas a wife, having no property, was under no obligation to bury her husband, now that she may have property she is under that obligation. *Bertie* v. *Chesterfield* (2) is the only case in which

(1) 3 Y. & J. 28.

(2) 9 Mod. 31, 32.

the liability of a husband of a deceased wife and the liability of her executor have been considered in relation to one another, and in that case the executor recovered against the husband's estate. [*In re M'Myn* (1); *Jenkins* v. *Tucker* (2); *Ambrose* v. *Kerrison* (3); *Gregory* v. *Lockyer* (4); *Reg.* v. *Vann* (5); *Clark* v. *London General Omnibus Co.* (6) and *Willeter* v. *Dobie* (7) were also referred to.]

SCOTT L.J. In this case the defendant appeals from the judgment of Judge Evans, finding him liable to repay to the executors of his wife's will certain payments made by them in that capacity, amounting in all to 51*l.* 15*s.* of which 32*l.* 17*s.* 6*d.* represented the cost of her funeral and burial and the balance, 18*l.* 7*s.* 6*d.*, was for medical and nursing services in the lady's last illness. The defence was a denial of liability and a plea that "the payments were not made for or on the defendant's "behalf." The wife had property of her own, shown in the account for estate duty at 1,063*l.* 8*s.* 3*d.* (gross) of personalty, and 1,200*l.* (gross) of realty, with total debts (including the above items) of only 170*l.* 4*s.* For the last three months of her life the deceased had been living in the house of her brother-in-law and sister, the executor and executrix named in the will and plaintiffs in the action, her husband visiting her there regularly. The defendant and the deceased had been married in 1937. There was no evidence below of any request having been made to the plaintiffs by the defendant to pay either of the debts. In the particulars of claim there was also a personal claim by H. W. Rees against the defendant for board and lodging of the deceased, but that was withdrawn. Mr. George, solicitor for the defendant in the court below, there submitted that the deceased was, as a result of modern legislation about married women, in exactly the same position as a feme sole or a man in regard to property rights and duties, and that therefore the claim by her personal representatives against the husband for burial and funeral expenses was bad in law. The cost of medical and nursing expenses was, he contended, either a debt of the deceased and not of the husband, or, alternatively, if it was the husband's debt, there was no request by him to the plaintiffs to pay it, and no payment by the executors in mistake

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(1) 33 Ch. D. 575.
(2) 1 Hy. Bl. 90.
(3) 10 C. B. 776.
(4) 6 Madd. 90.
(5) (1851) 2 Den. C. C. 325.
(6) [1906] 2 K. B. 648.
(7) 2 K. & J. 647.

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of fact. It was therefore a voluntary payment irrecoverable from him. The learned judge, however, seems to have held that the medical and nursing services were " necessaries," and that that fact of itself entitled the executors to recover from the husband—on what ground, I do not understand. In regard to the funeral expenses, he relied on " a presumption of law in the " absence of special circumstances " that the husband was liable, that there were no special circumstances, and that therefore the husband must pay. In my opinion, he was wrong on both issues.

I will take the funeral expenses first. On this topic, Mr. Sutton, for the husband, in an illuminating exposition of the position of married women, traced the early case history both at common law and in equity down to 1883, and thereafter the statutory history beginning with the Married Women's Property Act, 1882. His argument is, in my view, unanswerable. There is an obligation at common law, in the nature of a public duty, which rests on certain persons in whose possession a dead body may be—a husband being one—to bury it. And at common law, before modern legislation about married women, if a woman died covert, her husband was bound to discharge that duty, at his own expense, up to a reasonable amount, no doubt varying with his position in the world. So fundamental was his obligation that even a stranger, who as a volunteer carried out the funeral and burial of the dead wife at his own expense, was entitled to recover the amount (up to that reasonable limit) from the husband. It was this ancient duty of the husband at common law which the learned judge doubtless had in mind when he decided against the defendant. But, as Mr. George, his solicitor, rightly submitted to the learned judge, that position has been completely changed by legislation. The very foundation of the duty, the foundation which gave rise to the common law doctrine, has completely gone, and has taken with it the superstructure which the common law had erected on it.

In order to demonstrate the change in the position, Mr. Sutton took the court through the relevant decisions, in logical sequence, beginning with *Willock* v. *Noble* (1), from which he cited Lord Cairns, Lord Chelmsford, and Lord Hatherley. The wife being by marriage completely identified with her husband and having at law no property of her own, and no separate power of disposition, the duty of burying her body

(1) L. R. 7 H. L. 580, 589–91, 596, 603.

inevitably fell at common law on her surviving husband. *Bertie* v. *Lord Chesterfield* (1), was an early recognition of the husband's duty at law, in which it was held that a power in equity of disposition over settled personalty could not extend to her own funeral expenses since that would mean that "she had given away more than she had to dispose." Although it was not proved in that case that the late Earl had requested the plaintiff, as executor of the Countess's equitable estate, to pay the funeral expenses, his bill claiming those expenses against the late Earl's estate was allowed with costs. The executor of the Countess was not liable because he was not executor of property on which the liability for funeral expenses would or could legally fall. No authority for the proposition, that even in the pre-1883 period the executor of a married woman disposing by will of her equitable settled estate had any liability at common law to pay for her funeral expenses, was called to our attention by Mr. Gardiner for the plaintiffs, and Mr. Sutton submitted that there is none. That equity would give effect to a direction in the will of a married woman that her funeral expenses should be paid out of her settled estate does not touch the common law rule of the husband's obligation. In this context Mr. Sutton cited *Gregory* v. *Lockyer* (2), *Williter* v. *Dobie* (3), *In re M'Myn* (4) per Chitty J.

Where a man dies possessed of personal property, the duty of burying his body falls primarily on his personal representatives: (see Blackstone's Commentaries, Bk. II., ch. 33, at p. 508 of the 10th ed.). And this duty entitles the personal representative to absolute priority of reimbursement out of the estate: (see *Edwards* v. *Edwards* (5), per Parke B.—a case of an insolvent estate). By an extreme application of the executor's liability the common law allowed even a stranger to recover from the estate his voluntary expenditure on funeral expenses: see *Tugwell* v. *Heyman* (6), and particularly see the note to that case to the effect that a stranger who uses assets of the estate for that purpose does not thereby make himself an executor de son tort. That funeral expenses fall within executorship expenses hardly seems to call for authority, but Mr. Sutton cited to us three plain cases: *Sharp* v. *Lush* (7), per Sir George Jessel M.R., *Green* v. *Salmon* (8) and *Williams*

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(1) 9 Mod. 31.
(2) 6 Madd. 90.
(3) 2 K. & J. 647, 649.
(4) 33 Ch. D. 575, 576 577.
(5) 2 C. & M. 612, 615.
(6) 3 Camp. 298.
(7) 10 Ch. D. 468, 472.
(8) 8 Ad. & E. 348.

v. *Williams* (1). Indeed the executor is not only so entitled, but is bound thereto, because apart altogether from the will the law imposes that duty.

The modern statutory alteration of the married woman's position began on January 1, 1883, when the Married Women's Property Act, 1882, came into force. [His Lordship read s. 1, sub-s. 1 of the Act and continued :] The next stage in the journey of the married woman to independence was brought about by the Administration of Estates Act, 1925. [His Lordship read s. 32, sub-s. 1 ; s. 33, sub-ss. 1, 2, 7 ; s. 34, sub-ss. 1, 3 ; and continued :] Of course in sub-s. 1 of s. 32 the masculine includes the feminine. Rule 1 of the first part of the first schedule, mentioned in s. 34, sub-s. 1, provides " The funeral, " testamentary and administration expenses have priority." Section 45, sub-s. 1, of the Act in effect abolishes all rules of distribution other than those contained in the Act, excepting only entailed interests (sub-s. 2). Section 46, sub-s. 1, provides in detail for the distribution of the residuary estate of an intestate, and sub-s. 2 says : " If the intestate leaves issue but " no husband or wife, the residuary estate of the intestate shall " be held on the statutory trusts for the issue of the intestate."

As the result of the above provisions, read with the Act of 1882, Mr. Sutton submitted that husband and wife became entirely separate persons in law and were treated as being each in precisely the same position as the other for practically all purposes connected with the rights and obligations in connexion with property. Whatever gaps were still left were, however filled in by the Law Reform (Married Women and Tortfeasors) Act, 1935. The amendments to previous Acts contained in the second column of sch. I. and the repeals contained in the third column of sch. II. are consequential on the main provisions of the Act, and fill in the interstices in order to perfect the reform intended by Parliament—so that for all questions of rights or liabilities relating to property of any kind there should in future be no difference whatever between the position of a married woman and a feme sole—or, for that matter, of a man.

This being the effect of the express language of the three statutes, all the original reasons, which made the common law put on the husband the public duty of burying his deceased wife, have wholly ceased to operate. The contention of the defendant is that, if the wife is to be treated as a feme sole, the duty of burying her in that capacity necessarily falls on her personal representatives, to exactly the same extent and for the same reasons as on the death of her husband it is the duty of his personal representatives to bury him. That contention is in my opinion well founded, as resting on an express provision of statute law. But if there be any doubt as to the meaning of the express provisions, I regard it as a case where the maxim "Cessante ratione legis, cessat ipsa lex" applies directly and obviously. In ch. IV. on "Rules of Logic," Broom, in the 10th ed. of his Maxims, at p. 94, begins with the positive and complementary maxim "Ubi eadem ratio, ibi idem jus," which he paraphrases as "The law consists not in particular "instances and precedents, but on the reason of the law," quoting Holt C.J. in *Ashby* v. *White* (1). The negative maxim, which is the more relevant in the instant case, he paraphrases at p. 97 in Coke's words (Co. Litt. 70*b*): "Reason is "the soul of the law, and when the reason of any particular law "ceases, so does the law itself." The legislation about married women has thus caused the law requiring the husband to bury his dead wife to cease—at any rate, where she leaves assets, as in the present case.

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(1) 20 Ch. D. 659, 664.

As regards the other heads of claim, for doctor's fees and nursing charges, there obviously can be no liability on the husband. The fact that both types of service might or would come within the description of "necessaries," if they had been rendered on the credit of the husband, is irrelevant. As the wife was ill, as a feme sole the prima facie presumption of law is that credit was given to her and not to her husband; and, there being no fact in evidence to support a finding that either doctor or nurse relied on the husband's credit, there was no possible foundation in law for the learned judge's conclusion. But in any case, if the wife's executors, who paid, did so because they thought the husband was liable—a most unlikely supposition—they were mere volunteers, paying under a mistake not of fact but of law, and "money paid at request" does not lie in such a case.

Since writing this judgment I have read the judgments of my brethren and agree with them. The appeal must be allowed with costs here and below—there on scale C.

MORTON L.J. (read by TUCKER L.J.). I have had the advantage of reading the judgment which is about to be

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(1) 2 Ld. Raym, 957.

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delivered by Tucker L.J. I agree with that judgment, and I only desire to make a few brief observations. In the present case the wife's estate was sufficient for payment of her funeral expenses. I am satisfied that in such a case the husband is now under no liability to pay these expenses. The question whether a husband still remains liable to pay his wife's funeral expenses if the wife leaves no estate, or if the wife's estate is insufficient to make this payment, does not arise in the present case, and I do not think that Scott L.J. has expressed, or that Tucker L.J. intends to express, any opinion on it. In these circumstances I propose to follow their example. This question may never come before the court for decision.

TUCKER L.J. There are two quite distinct questions involved in this appeal. The first is whether the executors of Gwen Roberts Hughes, deceased, can recover from her husband the sum of 18*l.* 17*s.* 6*d.*, being the sum which they in their capacity of executors have paid in respect of medical attendance and nursing fees incurred during the last illness of the deceased lady. The second is whether they can recover the sum of 32*l.* 17*s.* 6*d.* which they have paid in respect of the funeral expenses, the will having contained no direction with regard thereto. The learned county court judge has decided both questions in favour of the executors and given them judgment for 51*l.* 15*s.* The first question can, in my opinion, be very shortly disposed of. The medical and nursing fees must have been a liability either of the husband or the wife. If they were the wife's liability they have been properly discharged out of the estate and there is no liability on the husband. On the other hand, if they were the liability of the husband, they should not have been paid by the executors, and if the executors have paid them without any request from the husband and without legal compulsion so to do, they cannot recover the money so paid from the husband. There was no suggestion that there had been any such request, express or implied, or any compulsion in law and, consequently, this part of their claim should have been dismissed.

The funeral expenses raise very different considerations. It is common ground that at common law, before modern legislation altering the status of married women, the husband was liable for his wife's funeral expenses. And in the interests of public decency the law allowed a stranger, who had voluntarily incurred and paid such expenses, without any request

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from the husband so to do, to recover them from him. See *Jenkins* v. *Tucker* (1), *Ambrose* v. *Kerrison* (2), and *Bradshaw* v. *Beard* (3). In such cases the law will imply a request on the part of the husband to do that which it is his legal and moral obligation to perform. But Mr. Sutton, for the husband contends that the effect of the Married Women's Property Act, 1882, the Administration of Estates Act, 1925, and the Law Reform (Married Women and Tortfeasors) Act, 1935, has been to put married women as regards their property and contracts in the same position as femes soles, that is, on the same footing as men. Before considering the provisions of those statutes as affecting married women it may be convenient to state the position with regard to the burial expenses of a man. It has long been well settled that where a man dies possessed of property his funeral expenses must come out of that property. In Blackstone's Commentaries, Bk. 2, ch. 32, p. 508, dealing with the powers and duties of an executor, it is said: "He "must bury the deceased in a manner suitable to the estate "which he leaves behind. Necessary funeral expenses are "allowed, previous to all other debts and charges." See also *Edwards* v. *Edwards* (4), where Parke B. said: "I take the "rule to be, that the executor is entitled to be allowed reasonable expenses, and if he exceeds those he is to take the chance "of the estate turning out insolvent." In *Tugwell* v. *Heyman* (5) and *Rogers* v. *Price* (6), it was held that executors with assets in their hands were liable for payment of funeral expenses even where they had not ordered the funeral. And this was stated to be the law by Sir George Jessel M.R. in *Sharp* v. *Lush* (7).

It is contended for the husband that the law as there stated is now equally applicable to the executors of a deceased married woman. Section 1 of the Married Women's Property Act, 1882, provided that a married woman should be capable of acquiring, holding and disposing of any real or personal property as her separate property as if she were a feme sole. Then in 1935 the Law Reform (Married Women and Tortfeasors) Act, 1935, provided in s. 1, so far as material, as follows: "Subject to the "provisions of this Part of this Act . . . . a married woman "shall (*a*) be capable of acquiring, holding and disposing of any

(1) 1 H. Bl. 90.
(2) 10 C. B. 776.
(3) 12 C. B. (N. S.) 344.
(4) 2 C. & M. 612.
(5) 3 Camp. 298.
(6) 3 Y. & J. 28.
(7) 10 Ch. D. 472.

" property and (*b*) be capable of rendering herself and being " rendered liable in respect of any tort, contract, debt or " obligation and (*c*) be capable of suing and being sued either in " tort or in contract or otherwise, and (*d*) be subject to the law " relating to bankruptcy and to the enforcement of judgments " and orders, in all respects as if she were a feme sole." Section 2 provides : " Subject to the provisions of this Part of " this Act all property which (*a*) immediately before the passing " of this Act was the separate property of a married woman or " held for her separate use in equity or (*b*) belongs at the time " of her marriage to a woman married after the passing of this " Act or (*c*) after the passing of this Act is acquired by or " devolves upon a married woman, shall belong to her in all " respects as if she were a feme sole and may be disposed of " accordingly." A married woman having thus been put in these respects on the same footing as a feme sole, which is equivalent for these purposes to that of a man, the result is that the provisions of the Administration of Estates Act, 1925, are equally applicable to the estate of a married woman as to the estate of her husband. It is, I think, sufficient to refer to s. 34 and to the first schedule. [His Lordship read sub-.s 3 of s. 34 and continued :] Part I. of the first schedule deals with the order of payment of debts where the estate is insolvent and provides that the funeral, testamentary and administration expenses have priority. It seems clear therefore—and I do not understand this to be disputed—that the executors of a deceased married woman are now liable to pay her funeral expenses. But it is contended for the executors that the husband still remains liable as he was at common law and that his liability is the " primary " liability, so that the executors can recover from him any sum which they have been called upon to pay as a result of their " secondary " liability. No authority for this proposition was cited and for my part I do not understand in this connexion the notion of a " primary " and " secondary " liability. The executors, it is to be noted, are not claiming contribution. They are asking to be indemnified. I think the true view is that contended for by Mr. Sutton, namely, that the basis of the husband's liability at common law was the status of a married woman and her limited power to make a will as described by Lord Cairns in *Willock* v. *Noble* (1), where he says : " Before the Wills Act a married " woman was, as a general rule, incapable of making a will.

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(1) L. R. 7 H. L. 589.

"Her will of land was declared void by statute. Her will of "personalty was equally invalid, not merely because marriage "was a gift of her presonalty to her husband, but because in "the eye of the law the wife had no existence separate from "her husband, and no separate disposing or contracting power." He then goes on to refer to certain modifications which were engrafted on this general rule and points out that the Wills Act left her capacity to make a will exactly as it stood before the Act.

Mr. Gardiner, for the executors, relied upon certain cases where courts of equity have been called upon to decide whether the wife's separate estate or the husband should bear the funeral expenses. In *Gregory* v. *Lockyer* (1), where a decree had directed the funeral expenses to be paid out of the separate estate of a feme covert, the Vice-Chancellor ordered the cost thereof to be repaid by the executor to the husband who had actually paid the bill, but expressed a doubt whether generally the husband has a right to throw the funeral expenses on the wife's separate estate. In *Williter* v. *Dobie* (2), the wife, in exercise of certain powers of appointment given to her notwithstanding coverture in relation to her separate estate, appointed the residue among her nieces "after payment of her just debts, funeral and testa-"mentary expenses." It was held that this was a good charge upon the residue. The Vice-Chancellor said that the rule that a husband is liable to pay the funeral expenses equally with the debts of his deceased wife was not disputed but added "the "point is whether by this clause in her will, the wife has not "relieved her husband out of her separate estate. Whether "she has not made him a present, in effect, of what her funeral expenses would have cost him." In *In re M'Myn* (3) Chitty J. said: "In *Williter* v. *Dobie* (2), it is true that there was a charge "by the wife of her funeral expenses. It is also true that the "law casts upon a husband the duty of burying his wife, but the "law does not on that account cast upon the husband the burden "of burying his wife at his own cost always. In most cases the "husband takes all his wife's personal property by reducing it "into possession during his lifetime. To call upon him to bury "her out of his own moneys in a case like the present, where the "wife exercised her power of appointment, and made the fund "general assets for her creditors but has omitted to mention "her funeral expenses, would be too hard. I think, therefore,

(1) 6 Madd. 90.
(2) 2 K. & J. 647.
(3) 33 Ch. D. 576.

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"that the husband is entitled to retain the sums expended on "her funeral." In *Bertie* v. *Chesterfield* (1), the executor under the will of a married woman, made in pursuance of a power to dispose of property the subject of separate maintenance, who had paid the funeral expenses of the married woman, was allowed to be reimbursed out of assets of her deceased husband which he had devised to a third party subject to the payment of his debts.

These cases, in my view, merely indicate that the court in the exercise of its equitable jurisdiction was always careful to see that the separate estate of a married woman should not without sufficient reason be made to bear an obligation which was the husband's at common law. Now that the separate estate of a married woman has ceased to exist and she has in this respect the status of her husband, the very foundation for the old common law rule has disappeared and the wife's estate is, in my view, liable for that which had previously been an obligation imposed on the husband, who had by the marriage acquired his wife's personalty.

For these reasons, I think the executors' claim against the husband was not maintainable and that this appeal succeeds.

Appeal allowed.

Solicitors for the plaintiff: *Sharpe, Pritchard & Co., for Porter & Co., Plas Vedre, Conway.*

Solicitors for defendant: *Rhys Roberts & Co., for William George & Son, Portmadoc.*

(1) 9 Mod. 31.

A. W. G.

Criticized. NOOR MOHAMED *v.* THE KING. [1949] A. C. 182

Dictum of LORD GODDARD, C.J., at p. 539, *doubted.* NOOR MOHAMED *v.* R. [1949] 1 All E.R. 365.

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Apr. 15;
May 13.

Lord Goddard C.J., Oliver, Croom-Johnson, Denning and Lynskey JJ.

Criminal law—Joinder of charges—Unnatural offences charged in respect of several persons—Application for separate trials—Admissibility on one count of evidence on other counts—Evidence showing bad disposition—Acts connecting accused with specific features of crime—Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 5, *sub-s.* 3.

Where several counts are joined in one indictment, the mere fact that evidence is admissible on one count and inadmissible on another is not by itself a ground for directing separate trials,

Explained. HARRIS *v.* DIRECTOR OF PUBLIC PROSECUTIONS [1952] A.C. 694

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unless the prejudice created by such evidence would be improper and too great to be overcome by any direction in the summing-up.

Evidence that the accused has a bad reputation or a bad disposition is to be excluded only if it shows nothing more. Where it relates also to other acts having specific features connecting the accused with the crime charged, it is admissible, irrespective of the issues raised by the defence. A similar rule applies in respect of articles found in the possession of the accused.

Where therefore a person was charged in one indictment with several charges of sodomy and gross indecency with several different men and the evidence of each man was that the accused invited him into his house and there committed the acts charged, which acts bore a striking similarity in each case :—

Held, that, sodomy being a crime in a special category, the repetition of the acts was a specific feature connecting the accused with the crime and that, in the interests of justice, evidence of such acts was admissible in each case to show the nature of the act done by the accused. Such charges could therefore be properly tried together and there was no reason for the trial judge to direct the jury that in considering each charge they were to disregard the evidence on the others.

Rex v. *Cole* (1810) Judges' Note Books on Crown Cases, Vol. 3, considered.

Rex v. *Ailes* (1918) 13 Cr. App. R. 173, approved.

Observations in *Rex* v. *Bailey* [1924] 2 K. B. 300, dissented from.

Rex v. *Southern* (1930) 22 Cr. App. R. 6, doubted.

APPEAL AGAINST CONVICTION.

The accused, George Sims, was tried before Wrottesley J. on an indictment containing ten counts. Counts 1 and 2 contained charges of sodomy and gross indecency respectively with a man, A. M.; counts 3 and 4 contained similar charges in respect of another man, C. M.; counts 5 and 6 contained similar charges in respect of another man, H. S.; count 7 contained a charge of gross indecency with another man, E. G. W.; and counts 8, 9 and 10 contained charges of gross indecency with three boys.

At the trial the accused made an application that the counts be tried separately in respect of each separate man or boy. Wrottesley J. refused the application so far as the four men were concerned and the accused was thereupon tried on the first seven counts. He was found guilty on counts 1, 3 and 5, but acquitted on counts 2, 4, 6 and 7. He was sentenced to five years penal servitude.

The accused applied for and was granted leave to appeal against his conviction.

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Casswell K.C. and *Raymond Stock* for the appellant. It is a fundamental rule that no evidence should be admitted to show the propensity of the accused to commit the crime charged against him: Phillips Law of Evidence, 9th ed., Vol. 1, p. 477; *Rex* v. *Cole* (1). In the present case the charges concerned four different men on four different occasions and the only way in which those four cases were connected was in that the same man was accused of all. The effect of trying all the cases together was to make the jury say " This is a dirty old man, " because four different persons have given similar evidence " about him." In *Castro* v. *Reg.* (2) Lord Blackburn said it had been well established that where there were several charges of the nature of felony, the joining of two felonies in one indictment was so unfair to the prisoner that the judge ought, on application being made to him, to put the prosecutor to his election and send them to two trials. It is especially essential that there should be separate trials where all the witnesses are uncorroborated, as in the present case. [Lord Goddard C.J. These matters must be looked at in the light of the great changes which have taken place in criminal procedure since *Cole's* case.]

In *Rex* v. *Bailey* (3) it was held that where an indictment for indecent assault contained a number of counts charging separate assaults on different persons, the jury should be warned to draw a careful distinction between the evidence on each count and the evidence on every other count and not to supplement the evidence on any particular count by looking at the evidence as a whole. No such warning was given in the present case. In *Rex* v. *Ailes* (4) the accused was charged on an indictment containing three counts, two charging him with indecently assaulting a child on two different dates and the third charging him with indecently assaulting another child. He was tried on the first two counts and the other child was called as a witness to show that the accused had distorted sexual passions and was addicted to acts of indecency. The Court of Criminal Appeal held that that was right, but that a better course would have been to try all the offences together. That decision is clearly at variance with the general rule and ought not to stand.

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(1) (1810) Judges' Note Books on Crown Cases, vol. 3; cited in Phillips on Evidence, 10th ed., vol. 1, p. 508. Post. p. 544. (Note.—The Judges' Note Books are in the custody of the Lord Chief Justice.)

(2) (1881) 6 App. Cas. 229, 244.

(3) [1924] 2 K. B. 300.

(4) (1918) 13 Cr. App. R. 173.

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In *Thompson* v. *Rex* (1) Lord Sumner said: "No one doubts "that it does not tend to prove a man guilty of a particular "crime to show that he is the kind of man who would commit "a crime, or that he is generally disposed to crime and even to "a particular crime." In that case, where the accused was charged with gross indecency with boys, evidence of the finding of powder puffs and photographs belonging to the accused was admitted because the accused had pleaded an alibi and there was a question of identity. It is true that similar evidence was admitted in *Rex* v. *Twiss* (2), but even if that was right it would be going much further to hold that evidence of special propensity is admissible in a case like the present.

Even if the counts could properly be tried together in the present case the trial judge ought to have directed the jury that they must consider each count separately (*Rex* v. *Southern* (3)) and that the evidence given by one uncorroborated witness could not be used to corroborate another uncorroborated witness. This he failed to do. He also failed to direct the jury as to which parts of the evidence, if any, might legally be regarded as corroboration.

Willink K.C., *Hawke* and *Skelhorn* for the Crown. It is first necessary to consider the true construction of s. 5, sub-s. 3, of the Indictments Act, 1915, which provides that where the court is of opinion that a person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, the court may order a separate trial of any count or counts. On the authorities the words "prejudiced or embarrassed" do not mean merely the unpleasant fact of having to face more than one charge. The question is whether the trial together of a number of counts gives the judge a task which he may not be able to fulfil because of the difficulty of directing the jury. In *Castro* v. *Reg.* (4) Lord Blackburn pointed out that there was no legal objection to any number of felonies or any number of misdemeanors being tried together. [Counsel cited a number of authorities in which two or more offences had been tried together.] It has never been considered that in a case like the present it was prejudicial to the accused to try two or more counts together. The protection of the accused is secured by the discretion which the court has to order separate trials where it thinks it desirable to do so. So in *Rex* v. *Norman* (5) the Court of Criminal Appeal held that the accused in that case ought not to have been tried on all the counts in the indictment together on the ground that the accused might have been embarrassed by the complexity of the charges and not merely by the multiplicity of counts. The question is one for the discretion of the trial judge and provided that he has exercised such discretion judicially the Court of Criminal Appeal will not interfere with his decision: see per Darling J. in *Rex* v. *Gibbins and Proctor* (1).

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(1) [1918] A. C. 221, 232.

(2) [1918] 2 K. B. 853.

(3) (1930) 22 Cr. App. R. 6.

(4) 6 App. Cas. 229, 244.

(5) [1915] 1 K. B. 341.

[LORD GODDARD C.J. This court has recently upheld that view in *Rex* v. *Grondkowski, Rex* v. *Malinowski* (2).]

The Indictments Act must be deemed to have contemplated that there would be trials on more than one count where evidence might be admitted which would not otherwise have been admissible. It is for the judge to direct the jury as to the separation of the issues, but *Rex* v. *Southern* (3) went too far. The law on that point should not be extended beyond the principle stated in *Rex* v. *Bailey* (4). Where there is no real danger of confusion the trial together of several counts of a similar nature is not necessarily embarrassing, because the judge can direct the jury to treat them separately. In the present case the trial judge did direct the jury to treat the counts separately and it cannot therefore be said that the accused was prejudiced or embarrassed.

With regard to the contention that the judge did not direct the jury properly as to what should be regarded as corroboration it is not necessary for the judge to go through all the evidence and say what is and what is not capable of being corroboration. The direction given by the judge in the present case was sufficient. [Counsel referred to *Rex* v. *Farid* (5).]

Casswell K.C. replied.

LORD GODDARD C.J. This appeal must be dismissed, but in view of its great importance the court will give their reasons at a later date.

May 13. LORD GODDARD C.J. read the written judgment of the court, which he stated had been largely prepared by DENNING J. The important point involved in this appeal is whether the judge ought to have ordered separate trials in respect of each man involved. There is no doubt that the counts

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(1) (1918) 13 Cr. App. R. 134.
(2) Ante p. 369.
(3) 22 Cr. App. R. 6.
(4) [1924] 2 K. B. 300.
(5) (1945) 30 Cr. App. R. 168.

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were properly included in one indictment, because by r. 3 of the rules under the Indictments Act, 1915, "charges for any "offences, whether felonies or misdemeanors, may be joined "in the same indictment if those charges are founded on the "same facts, or form or are part of a series of offences of the "same or a similar character." The joinder in one indictment does not, however, decide the point because s. 5, sub-s. 3, of the Indictments Act, 1915, provides that "where, before "trial, or at any stage of a trial, the court is of opinion that a "person accused may be prejudiced or embarrassed in his "defence by reason of being charged with more than one "offence in the same indictment, or that for any other reason "it is desirable to direct that the person should be tried "separately for any one or more offences charged in an indict-"ment, the court may order a separate trial of any count or "counts of such indictment." That section confers a discretion on the judge with which this court will not interfere unless it sees that justice has not been done: see *Rex* v. *Grondkowski, Rex* v. *Malinowski* (1).

The appellant here says that justice has not been done because on a trial of the accused on the counts in respect of one man, evidence of offences in respect of the other men would not be admissible, and that he was therefore improperly prejudiced by the joint trial. We agree with the contention to this extent, that if such evidence was not admissible, the accused would be prejudiced in his defence and it would be desirable to direct separate trials. We do not think that the mere fact that evidence is admissible on one count and inadmissible on another is by itself a ground for separate trials: because often the matter can be made clear in the summing up without prejudice to the accused. In such a case as the present, however, it is asking too much to expect any jury when considering one charge to disregard the evidence on the others, and if such evidence is inadmissible, the prejudice created by it would be improper and would be too great for any direction to overcome. It was for reasons of this kind that before the Act of 1915 the court would order separate trials of separate counts for misdemeanors: see *Castro* v. *Reg.* (2) and *Rex* v. *Norman* (3). And since the Act the same principles apply in this respect to felonies as to misdemeanors: c. f. *Rex* v. *Southern* (4).

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(1) Ante p. 369.
(2) 6 App. Cas. 229, 244, 245.
(3) [1915] 1 K. B. 341, 343.
(4) 22 Cr. App. R. 6.

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The question, therefore, is whether the evidence was admissible. There are observations of this court each way and we have felt it necessary, therefore, to consider the matter afresh. Much depends on the proper approach. We start with the general principle that evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether the prisoner has committed the act charged. To this principle there are exceptions. One of the most important exceptions is this: Evidence that the accused has a bad reputation or has a bad disposition is not admissible unless he himself opens the door to it by giving evidence of good character or otherwise under the Criminal Evidence Act, 1898. The reason for excluding evidence of bad character was said by Willes J. to be policy and humanity. He thought that evidence of bad character was just as relevant as evidence of good character, but the unfair prejudice created by it was so great that more injustice would be done by admitting it than by excluding it: see *Reg.* v. *Rowton* (1). Lord Sumner, however, thought it was irrelevant: see *Thompson* v. *Rex* (2). We do not stay to consider which view is correct. The exception is well settled. The question is what are its limits. In our opinion it does not extend further than the interests of justice demand. Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more. There are many cases where evidence of specific acts or circumstances connecting the accused with specific features of the crime has been held admissible, even though it also tends to show him to be of bad disposition. The most familiar example is when there is an issue whether the act of the accused was designed or accidental or done with guilty knowledge, in which case evidence is admissible of a series of similar acts by the accused on other occasions, because a series of acts with the self-same characteristics is unlikely to be produced by accident or inadvertence: see *Makin* v. *Attorney-General for New South Wales* (3). Another example is where there is an issue as to the nature of an act done by the accused with or to another person, in which case evidence is admissible of a series of similar acts between them, because human nature has a propensity to repetition and a series of acts is likely to bear the same characteristics: see *Rex* v. *Ball* (4). So also where there is an

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(1) (1865) Leigh & Ca. 520, 540, 541.

(2) [1918] A. C. 221, 232.

(3) [1894] A. C. 57, 65.

(4) [1911] A. C. 47.

issue as to the identity of the accused, we think that evidence is admissible of a series of similar acts done by him to other persons, because, while one witness to one act might be mistaken in identifying him, it is unlikely that a number of witnesses identifying the same person in relation to a series of acts with the self-same characteristics would all be mistaken. In all these cases the evidence of other acts may tend to show the accused to be of bad disposition, but it also shows something more. The other acts have specific features connecting him with the crime charged and are on that account admissible in evidence. A similar distinction exists in respect of articles found in possession of the accused. If they have no connexion with the crime except to show that the accused has a bad disposition, the evidence is not admissible; but if there are any circumstances in the crime tending to show a specific connexion between it and the articles, the evidence is admissible; see per Lord Sumner in *Thompson* v. *Rex* (1). Thus, in the case of burglary, evidence is admissible that housebreaking implements such as might have been used in the crime were found in the possession of the accused. In the case of abortion, evidence is admissible that the apparatus of an abortionist such as might have been used in the crime was found in the possession of the accused. The admissibility does not, however, depend on the circumstance that the articles might have been used in the crime. If there is any other specific feature connecting the articles with the crime, it will suffice. Thus, in the case of *Thompson* (2), there was no suggestion that the photographs were used in the crime charged, but the House of Lords found a connexion between the crime and the photographs in that the criminal on the 16th showed a propensity to unnatural practices by making an appointment for the 19th and the accused showed a like propensity by the photographs found in his possession. In the cases of *Twiss* (3) and *Gillingham* (4), there was also no suggestion that the photographs were used in the crime charged, but the court found a connexion between the two in that the crime itself showed a propensity to unnatural practices and the photographs showed a like propensity. The specific feature in such cases lies in the abnormal and perverted propensity which stamps the individual as clearly as if marked by a physical deformity. We think that in all the cases where evidence has been admitted there have been speci-

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(1) [1918] A. C. 234.
(2) [1918] A. C. 221.
(3) [1918] 2 K. B. 853.
(4) (1939) 27 Cr. App. R. 143.

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fic features connecting the evidence with the crime charged as distinct from evidence that he is of a bad disposition. This is illustrated by the cases on false pretences where evidence can be given of other transactions when similar false pretences were used, because they have that specific feature in common; but not of different transactions which only show that the accused was of a generally fraudulent disposition.

It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused: see, for instance, the observations of Lord Sumner in *Thompson* v. *Rex* (1), and of this court in *Rex* v. *Lewis Cole* (2). We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view. It is only fair to the prosecution, because the depositions have often to be taken and the evidence called before the nature of the defence is known. It is also only fair to the accused, so that he should have notice beforehand of the case he has to meet. In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able, by confining himself at the trial to one issue, to exclude evidence that would be admissible and fatal if he ran two defences; for that would make the astuteness of the accused or his advisers prevail over the interests of justice. An attempt was made by the defence in *Rex* v. *Armstrong* (3) to exclude evidence in that way, but it did not succeed.

Applying these principles, we are of opinion that on the trial of one of the counts in this case, the evidence on the others would be admissible. The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity.

(1) [1918] A. C. 232.
(2) (1941) 28 Cr. App. R. 43.
(3) [1922] 2 K. B. 555, 565.

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That is a special feature sufficient in itself to justify the admissibility of the evidence; but we think it should be put on a broader basis. Sodomy is a crime in a special category because, as Lord Sumner said (1), "persons who commit "the offences now under consideration seek the habitual "gratification of a particular perverted lust, which not only "takes them out of the class of ordinary men gone wrong, "but stamps them with the hall-mark of a specialized and "extraordinary class as much as if they carried on their bodies "some physical peculiarity." On this account, in regard to this crime we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence on the others should be considered, and that, even apart from the defence raised by him, the evidence would be admissible.

In this case the matter can be put in another and very simple way. The visits of the men to the prisoner's house were either for a guilty or an innocent purpose: that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls: that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust.

If we are right in thinking that the evidence was admissible, it is plain that the accused would not be prejudiced or embarrassed by reason of all the counts being tried together, and there was no reason for the judge to direct the jury that, in considering whether a particular charge was proved, they were to shut out other charges from their minds.

(1) [1918] A. C. 235.

So much for the matter on principle. We must now turn to four particular authorities. The first is *Rex* v. *Cole* (1) which was decided in Michaelmas Term, 1810. It has never been reported but it has frequently been cited in the text books for the proposition that "it is not allowable to show, on the trial "of an indictment, that the prisoner has a general disposition "to commit the same kind of offence as that for which he "stands indicted. Thus, in a prosecution for an infamous "crime, an admission by the prisoner, that he had committed "such an offence at another time, and with another person, "and that he has a tendency to such practices ought not to be "received in evidence": see Phillips on Evidence, 10th ed., vol. 1, p. 508, Russell on Crimes, 3rd ed., p. 700, Stephen on Evidence, art. 10. We have found a note of the case, however, in the Judges' Note Books on Crown cases. The note shows that Cole was tried on three indictments for sodomy on three boys. Each indictment was presumably tried separately. On the trial of Cole for sodomy on James Mcfier, evidence was given by John Cathie, the father of another boy, that he arrested Cole and that on arrest Cole in effect admitted that he had committed sodomy with Cathie's son and said that sodomy was his natural inclination. Cole was found guilty, but the judges were of opinion that the conviction was wrong on account of receiving Cathie's evidence. We in no way dissent from that decision, as in accordance with the practice then prevailing there were separate indictments in respect of each boy and the prisoner was being tried on one only. Even in 1810 the charges might have been included as three separate counts in the same indictment, but, being charges of felony, the prosecution would have been called on to elect on which they would proceed and so the counts would in effect become separated: see *Castro* v. *Reg.* (2). Hence the usual practice was to include only one felony in each indictment. Nowadays, however, the charges would, as a matter of course, be included in one indictment. Moreover, the law as to giving evidence of other offences was not developed in the year 1810. Only nine years later the judges met to consider *Rex* v. *Egerton* (3). Egerton was indicted for robbery of a man of his coat by threatening to accuse the prosecutor of an unnatural offence. On the trial evidence was tendered that on the next evening

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(1) (1810) Judges' Note Books on Crown Cases vol. 3; cited in Phillips on Evidence, 10th ed., vol. 1, p. 508. Post. p. 544.

(2) 6 App. Cas. 244.

(3) (1819) Russ. & Ry. 375.

Egerton made an attempt to obtain money from the prosecutor by similar threats. Holroyd J. admitted the evidence "on the ground of its being confirmatory of the truth of the "prosecutor's evidence as to the transactions of the former day, "and as to the nature of those transactions." He reserved the case for the opinion of the judges who held him to have been right. The two offences had specific features in common and the evidence would without hesitation be held admissible to-day. The fact that the admissibility was reserved for the opinion of the judges shows that the law was only then in process of development. In the third place, if the three counts had been tried together, there could have been no possible objection to the evidence of what Cole had said on his arrest. His admission that he had a natural inclination to sodomy would be clearly admissible.

The second case is *Rex* v. *Ailes* (1). There the indictment against Ailes contained three counts, two for indecent assault on a girl named Day, aged ten, and the third for indecent assault on another girl named Broomfield, aged twelve. In all three cases it was alleged that Ailes committed the assault in a cinema where he was an attendant. The two counts in respect of the girl Day were tried together, separately from the count in respect of the girl Broomfield. At the trial in respect of Day, the girl Broomfield was called to give evidence of the assault on her. The court, which consisted of Darling, Rowlatt and Shearman JJ., said that the girl Broomfield "was called, "quite rightly, to show that Ailes was a man with distorted "sexual passions and that he was addicted to such acts of "indecency." The court were so clearly convinced of this that they did not grant Ailes leave to appeal. In addition, the court indicated that a better course would have been to have tried all three counts together. That case fully supports the views we have expressed earlier in this judgment, and is to be noticed because it places offences with young girls on the same footing as unnatural offences with men or boys.

The third case is *Rex* v. *Bailey* (2). In that case Bailey was charged on an indictment containing nineteen counts, sixteen for indecent assaults on sixteen different boys and three for gross indecency with three of the boys. The case was tried before Rowlatt J. The charges were all tried together. On one of the counts no evidence at all was given as the boy was so frightened that he could not give evidence, but this seems to have been overlooked at the trial. The jury returned a general verdict

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(1) 13 Cr. App. R. 173.

(2) [1924] 2 K. B. 300.

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of guilty on all counts for indecent assault and acquitted on the charges of gross indecency. The Court of Criminal Appeal quashed the conviction on the ground that the verdict should have been taken separately on each count and that the general verdict could not in the circumstances be upheld. Thus far the decision calls for no comment and does not affect the present discussion; but the court in the course of its judgment said that if counsel for the defence had objected to the cases being tried together, the objection might have been upheld, and that the judge should have directed the jury not to supplement the evidence on any one charge by evidence on the other charges. We find ourselves unable to agree with those observations which were plainly obiter. We think that Rowlatt J. was in substance following *Rex* v. *Ailes* (1), to which he had been a party. He tried the cases together and allowed the evidence on each count to be supplemented by evidence in the others. The only mistake he made was in directing the jury to consider the case as a whole because that led to the general verdict. Each count should have been considered separately. Apparently *Rex* v. *Ailes* (1) was not cited to the Court of Criminal Appeal in *Rex* v. *Bailey* (2). If it had been, we doubt whether the observations would have been made.

The fourth case is *Rex* v. *Southern* (3). There the indictment against Southern contained two counts, one for gross indecency with a boy, aged thirteen, on June 14, 1929, and the other for indecent assault on a little girl, aged five, on November 2, 1929. The charges were tried together, but the Court of Criminal Appeal thought that if an application for separate trials had been made, it would probably have been granted. Talbot J. said: "The offences were not the same in law nor were they "in fact connected except by the circumstance that the same "man was accused of both." On that footing the case is in accord with the principles we have stated. Where an indictment contains counts for indecent offences against both male and female persons, it would not ordinarily be right to try the counts together, but where the persons assaulted are children, the mere fact that one is a small boy and the other a little girl would not in our opinion make it improper to try both cases together because the facts would indicate perverted lust on the part of the prisoner. If the court in *Southern's* case (3) intended to go the length of saying that because one count related to a little boy and another to a little girl separate trials

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(1) 13 Cr. App. R. 173.

(2) [1924] 2 K. B. 300.

(3) 22 Cr. App. R. 6.

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should have been granted, we are not disposed to follow the decision.

In the result, we think that there is nothing in the authorities which compels us to hold in the present case that the counts should have been tried separately or that the jury should have been directed, when considering each charge, to disregard the evidence on the others. That disposes of the two main points argued by Mr. Casswell in this appeal.

Two other points raised deal with corroboration. We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with caution; but the judge gave the jury ample warning as to acting on the evidence of an accomplice, and no objection can be taken to the summing up on that account. In some passages of the summing up, however, the judge did use expressions which seem to convey that it was for the jury to say whether there was corroboration or not. That, of course, is not the case. It is for the judge to say whether a particular piece of evidence, if accepted, is capable of being corroboration, and then for the jury to act on it or not as they think right. No injustice has, however, been done on that account here, because there was ample corroboration on which the jury might act, not only in the pots of vaseline found in the house of the accused, but also in the accused's own evidence. We see no reason for interfering with the verdict of the jury on that account.

In the result, therefore, we are of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Butt & Bowyer for Rutter & Rutter, Shaftesbury.*

Solicitor for the Crown: *Director of Public Prosecutions.*

H. A. P.

NOTE.

Michaelmas Term, 1810.

THE KING *v.* JOHN CAREY COLE.

The Prisoner was tried before the Chief Justice of the Common Pleas at the last Assizes at Buckingham on three indictments for sodomy on three boys of the names of James Mcfier, John Cathie and John

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Camac. He was convicted on the first and third indictment and acquitted upon that for the offence alleged to have been committed on John Cathie. On both of the indictments, i.e., in respect to the offence on Mcfier and on Cathie amongst other evidence the following was given in support of the prosecution.

John Cathie—I live in London Keep a Tavern—My Son went to Hughes's School. I apprehended the Prisoner in Dolphin Court Ludgate Hill—I had searched the Town from the 23rd December to 8th January. I enquired for him at a Coffee House in Dolphin's Court where I had reason to suppose he was. I described him and was told that a person of that description had frequented the house. I went there on Monday about 2 in the afternoon. I waited three or four hours. Cole came in at the door and ran out again immediately towards Ludgate Hill and entered some house in the Court. I knocked at No. 5. Prisoner rushed out and went down the Court into the street. I pursued and caught him and said "Mr. Cole I have got you." He said "I am a "dead man." He was in a fainting fit. A man came up and I asked him if he was a Father of a Family and would assist me. He did. I went towards Warwick Court Holborn where Mr. Hughes was. The prisoner said he would settle 20*l.* a year upon my child if I would make the matter up. I took him to the House and from thence before a Magistrate. On Friday following he was taken to Eton and Committed. I believe these letters are his writing.

I know nothing of his conduct towards Mcfier. Prisoner seemed very much affected and said he would pray to God for me for taking him. I asked him how he could be guilty of treating a child so. He told me it was his natural inclination and he had prayed to God to turn his mind to something better—wished he had blown his brains out the moment I saw him. He said I'll pray to God for you in my last moments—that when he was walking the streets his ideas and thoughts were always towards children—He could not avoid it.

(Signed) I. MANSFIELD.

Conviction wrong on account of receiving Cathie's evidence.

LIDDIATT *v.* GREAT WESTERN RAILWAY COMPANY.

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Mar. 25, 26;
Apr. 9.

Scott,
Tucker and
Cohen L.JJ.

Railway—Level crossing—Accommodation crossing—Duty of railway company to persons using such crossing—Negligence.

An accommodation crossing over a railway line was situated one hundred and sixty yards from a level crossing where a public carriage way crossed the line, and where the railway company employed a crossing keeper pursuant to s. 47 of the Railways Clauses Consolidation Act, 1847, to open and close the gates at that crossing. While cattle were being driven across the accommodation crossing a goods train was permitted by the crossing keeper to proceed across the level crossing, and it ran into the

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cattle and killed a heifer. The county court judge held that the crossing keeper was negligent in not seeing that the accommodation crossing was being used and in allowing the train to proceed :—

Held, that the railway company were under no duty to place a watchmen or keeper at the accommodation crossing or to take greater precautions than was usual in the normal workings of a railway, and the fact that the accommodation crossing was within one hundred and sixty yards of a level crossing where a public carriageway crossed the line did not enlarge the obligation of the railway company and impose an obligation upon them to instruct their signalmen who were within sight of an accommodation crossing not to allow a train to proceed until they had ascertained that the accommodation crossing was not in use.

APPEAL from a decision of the judge of the Thornbury county court.

The plaintiff, Mrs. Liddiatt brought an action against the Great Western Ry. Co., to recover damages for negligence in the following circumstances : At 5.15 p.m. on January 14, 1945, the plaintiff's husband as her agent was driving eight cattle across a private accommodation crossing over a single track of a branch line of the defendants' railway near Severn Beach in Gloucestershire when one of them—an in-calf heifer—was knocked down and killed by a goods train of the defendants.

The accommodation crossing was situate 160 yards to the east of a level crossing known as Green Lane where a public carriageway crossed the line. At the level crossing there were gates which when closed to railway traffic blocked the line and when open to railway traffic closed the carriage way. They were operated at the material time by an employee of the defendants named Mrs. Nawson who had been employed as a crossing keeper for twenty-two years. The gates at the accommodation crossing never obstructed the railway line, but were placed some yards to the north and south of the line and opened outwards. They were unlocked and opened and shut by hand. Post and rail fencing on both sides extended from the gates right up to the edge of the ballast forming a sort of droveway some 12 feet in width. On the south side the droveway extended to the south of the gate.

From the level crossing known as Green Lane to the Severn Beach signal box to the west is 1,030 yards, and to the distant signal 700 yards. The distant signal is not visible from the accommodation crossing. The train came from west to east. No negligence was alleged against the driver of the train. The plaintiff's husband was a platelayer employed by the defendants and was helping his wife in his spare time. The operation of getting the eight beasts across the line from the time when he opened the gate on the north side of the line would occupy about a quarter of an hour.

Mrs. Nawson, the crossing keeper, also operated the distant signal which was necessitated by reason of the existence of the level crossing of the highway. What she was required to do in her dual role of crossing keeper and signalman was well illustrated by what took place on the occasion in question. She received a telephone call from the signal box at Severn Beach that a train was coming. She thereupon opened the level crossing gates for the oncoming train, locked them and pulled the distant signal off to indicate to the driver of the oncoming train that the gates were open and it was accordingly safe for him to proceed.

Only one of the accommodation gates, namely, that on the south side was visible from the level crossing. The evidence on behalf of the plaintiffs was that the cattle were in fact collected on the droveway leading up to the south gate before the gate was opened.

The county court judge found that the level crossing keeper was guilty of negligence in failing to observe that the south gate of the accommodation crossing was open and that cattle were collected on the droveway leading up to that gate, and accordingly held that the loss of the heifer was due to the negligence of the defendants and entered judgment for the plaintiff for 50*l.*, the agreed amount of the damages.

The defendant company appealed.

Valentine Holmes K.C. and *Paton* for the defendants. The duty owed by railway companies with regard to level crossings was laid down in *Cliff* v. *Midland Ry. Co.* (1). It was there laid down by Lush J. that " where the legislature authorizes a " railway to cross a way, public or private, upon a level, and " does not require from the company any precaution to avoid " danger, the legislature intends that the persons who have to " cross that line should take the risk incident to that state of " things." In the present case the railway company were under no duty to put a watchman or keeper at the accommodation crossing. The fact that that crossing was within 160 yards of a level crossing at which the company were under a

(1) (1870) L. R. 5 Q. B. 258, 264.

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statutory duty to provide a crossing keeper did not extend the obligations of the company so as to impose upon them a duty to instruct the crossing keeper not to allow a train to proceed over the level crossing until she had seen that the accommodation crossing was not being used. The principle of law stated in *Cliff* v. *Midland Ry. Co.* (1) was adopted in *Ellis* v. *Great Western Ry. Co.* (2).

Maitland Walker for the plaintiff. The accommodation crossing was within 160 yards of the level crossing where the railway company were under a statutory obligation to have a crossing keeper whose duty it was to see whether it was safe for trains to proceed across the level crossing. It was therefore her duty to look up and down the line; she could see the accommodation crossing and the county court judge has found as a fact that if she had looked she could have seen that there were cattle on the accommodation crossing and therefore ought not to have allowed the train to proceed. It was laid down by Mellor J. in *Cliff* v. *Midland Ry. Co.* (3) that the railway company were bound "to do everything which is reasonably "necessary to secure the safety of persons who have to cross "the railway by means of the footway." The plaintiff was entitled to assume that the crossing keeper, who was also responsible for working the signal, would look in the direction of the accommodation crossing before allowing the train to proceed. The train was not visible from the accommodation crossing when the plaintiff's husband commenced to drive the cattle across the line.

Valentine Holmes K.C. replied.

Cur. adv. vult.

April 9. The judgment of the court was read by TUCKER L.J.

After stating the facts set out above, his Lordship continued: The crossing keeper, Mrs. Nawson, no doubt would not and should not have opened the gates until any traffic at the crossing had got safely across, nor should she have done so if she had observed any obstruction on the line. But it is said—and the learned judge has so held—that she was under a further obligation, namely, not to open the gates and pull off the distant signal until she had taken care to ascertain that the accommodation crossing, 160 yards distant to the east, was free of traffic, and by free of traffic it is clear from the judge's findings that he does not mean merely that the track itself was unobstructed but that there was no indication that the accommodation crossing was in use or likely shortly to be used. The judge has found that one only of the accommodation crossing gates, namely, that on the south side was visible from the level crossing and that the crossing keeper was guilty of negligence in failing to observe that this gate was open, that cattle were collected on the track leading up to the gate, and that two of them had got across to the north. The cattle collected on the track on the south would not, of course, have indicated any danger unless the gate had been open, and the evidence for the plaintiff was that they were in fact in that position before the gate was opened, so that the really vital matter was the open gate. In this connexion it is not without, importance to observe that the judge has found that the gate on the north side was not visible to her. It was, therefore always impossible for her to ascertain that the crossing was free of danger from the north side, and she would have to judge solely from the position of the southern gate.

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(1) L. R. 5 Q. B. 258.

(2) (1874) L. R. 9 C. P. 551.

(3) L. R. 5 Q. B. 261.

The learned judge has made the assumption—the correctness of which is not challenged by the defendants—that the railway company had given no instructions to the crossing keeper to make sure the accommodation crossing was free of traffic before she opened the level crossing gates. The defendants contended that they were under no obligation to give her any such instructions. They say that she was stationed at the level crossing pursuant to s. 47 of the Railways Clauses Consolidation Act, 1845, and her duties are as therein prescribed. Section 47 reads as follows :—" Provision in cases where roads " are crossed on a level.—If the railway cross any turnpike road " or public carriage road on a level, the company shall erect " and at all times maintain good and sufficient gates across such " road, on each side of the railway where the same shall com-" municate therewith, and shall employ proper persons to open " and shut such gates ; and such gates shall be kept constantly " closed across such road on both sides of the railway, except " during the time when horses, cattle, carts, or carriages passing " along the same shall have to cross such railway ; and such " gates shall be of such dimensions and so constructed as when " closed to fence in the railway, and prevent cattle or horses " passing along the road from entering upon the railway ; " and the person entrusted with the care of such gates,

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" shall cause the same to be closed as soon as such horses, cattle " carts, or carriages shall have passed through the same, under " a penalty of forty shillings for every default therein: " Provided always, that it shall be lawful for the Board of Trade, " in any case in which they are satisfied that it will be more " conducive to the public safety that the gates on any level " crossing over any such road should be kept closed across " the railway, to order that such gates shall be kept so closed, " instead of across the road, and in such case such gates shall " be kept constantly closed across the railway, except when " engines or carriages passing along the railway shall have " occasion to cross such road, in the same manner and under the " like penalty as above directed with respect to the gates being " kept closed across the road." In addition to her duties as crossing keeper she was required to put the distant signal—which existed by reason of the level crossing—in to the proper position after opening or shutting the gates. With regard to the line within her vision on each side of the crossing it is contended her duty was no different from that of any other servant of the company who might in the course of his duty observe some obstruction likely to endanger traffic on the line.

The nature of the duty owed by a railway company in connexion with crossings has from time to time received consideration in the courts. It is to be remembered that railway companies operate under statutory powers and, as was pointed out by Cockburn C.J. in *Ellis* v. *Great Western Ry.* (1), there is no analogy to be derived from ordinary road traffic cases. It has, we think, been generally accepted that the duty was correctly laid down by Mellor J. and Lush J. in *Cliff* v. *Midland Ry. Co.* (2). Mellor J. used these words (3): " when " Parliament authorizes a company to construct a railway and " to work it, it is implied in that that the company are to work " it in a reasonable proper manner, in the usual way in which " railways are worked; and in crossing a footway on the level " the company are bound, as to the mode of working their rail" way, as to the rate of speed, and signalling or whistling, or " other ordinary precautions in the working of a railway, to do " everything which is reasonably necessary to secure the safety " of persons who have to cross the railway by means of the " footway." Lush J., while expressly agreeing with this general statement, said " I think that where the legislature

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(1) L. R. 9 C. P. 551, 555.

(2) L. R. 5 Q. B. 258.

(3) Ibid. 261.

" authorizes a railway to cross a way, public or private, upon a " level, and does not require from the company any precaution " to avoid danger, the legislature intends that the persons who " have to cross that line should take the risk incident to that " state of things. But it may be, and I am inclined to think " that it is, a sound principle that if the railway company, " in the construction of the works so authorized, in the exercise " of the discretion which the legislature has vested in them, " do anything which prevents persons passing over the line " from taking care of themselves, and exposes them to greater " peril than is ordinarily incident to a level crossing, the " company thereby impose upon themselves an obligation to " take other than the usual precautions for the protection of " persons who have a right to pass there, and, as it were, " to make up to the public for that which they have taken " away from them."

In that case the court were agreed that there had been misdirection by the trial judge. One of the misdirections alleged was that the omission to provide a gatekeeper at an occupation crossing was left to the jury as fit for their consideration as a possible ground for finding negligence. As to this Mellor J. said " With reference also to the gatekeeper, I am inclined to " think the direction was wrong." Lush J. said " Now it " seems to me that the company would have no obligation " to do either the one thing or the other, no obligation to divert " the road . . . . or to employ anyone there to warn persons " coming on the road, because no such obligation is imposed " by the legislature." It had been previously held in *Stubley* v. *London & North Western Ry. Co.* (1), that there is no general duty on railway companies to place watchmen at public footways crossing the railway on the level.

In our view the railway company was under no duty to place a watchman or keeper at the accommodation crossing, nor was there any evidence that the crossing was so placed as to impose upon the railway company the duty to take some greater precaution at this spot than is usual in the normal working of a railway. Why then should the persons using this accommodation crossing be entitled to expect any greater consideration than the users of any of the other thousands of accommodation crossings on railway lines throughout the country ? The only answer we can think of is that it happens to be situate 160 yards from a level crossing where the line is

(1) (1865) L. R. 1 Ex. 13.

crossed by a public carriageway and at which the company are under a statutory duty to provide a crossing keeper. We cannot see that the mere propinquity of the two crossings can enlarge the obligations of the company or extend the scope of the duties of the keeper at the level crossing. It appears to us that the duty which the learned county court judge has placed upon the company is tantamount to requiring them to instruct all signalmen, whose boxes are within sight of an accommodation crossing, that they must not give the signal to proceed to any train unless and until they have ascertained that there is nothing to indicate that such crossing is in use or about to be used. We are assuming a case where the whole of the accommodation crossing and both its gates are in view of the signalman, unlike the present where only one gate was visible.

In our view a railway company is under no such obligation and so to require would be a considerable extension of the duty laid down by Mellor J. in *Cliff* v. *The Midland Ry. Co.* (1). We have not thought it necessary to refer to the question of contributory negligence. The plaintiff's agent embarked upon an operation which would require a quarter of an hour to complete at a time when he knew a goods train might be expected, without ascertaining whether it had passed and relying only on the fact that the level crossing gates were closed when he began the operation. This would, we think, require careful consideration if there had been any evidence of negligence on the part of the company. As in our view there was no such evidence the question does not arise. The appeal is allowed.

Appeal allowed.

Solicitor for the railway company: *M. H. B. Gilmour.*

Solicitors for plaintiff: *Salmon, Cumberland & Evans, Bristol.*

R. F. S.

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(1) L. R. 5 Q. B. 258.

Dicta of MORTON, L.J., at p. 558, *applied*. HARRISON *v*. HOPKINS. [1949] 2 All E.R. 597.

Followed. HARRISON *v*. HOPKINS [1950] 1 K. B. 124

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Morton, Somervell and Asquith L.JJ.

Landlord and Tenant—Rent Restrictions—Death of common law tenant—Executrix and sole beneficiary residing in dwelling-house—Notice to quit—Right to statutory tenancy.—Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*).

The tenant of a dwelling-house, to which the Rent Restriction Acts applied, by her will appointed the defendant sole executrix and beneficiary. The defendant had been living with the tenant for less than six months before the death of the latter while the common law tenancy still subsisted. The plaintiff, the landlord, subsequently served notice to quit on the defendant, who claimed the protection of the Rent Restriction Acts :—

Held, that since the entire interest in the tenancy had vested in the defendant as executrix and beneficiary before the date of the notice to quit, she was a " person deriving title under the original " tenant," within the meaning of s. 12, sub-s. 1 (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, since she was personally residing in the dwelling-house, was entitled to remain as statutory tenant.

Held, also, that even without the beneficial interest, she would still have been entitled to protection, for there is no authority for the proposition that an executor who has proved the will, who has not assented to a bequest to someone else, and who is in actual occupation of the house at the termination of the common law tenancy, is not entitled to the protection of the Acts.

Observations of Scrutton L.J. in *Skinner* v. *Geary* [1931] 2 K. B. 546 considered.

APPEAL from Bournemouth county court.

The plaintiff, Sydney Lawrance, was the owner of a dwelling-house known as " Westcott," 86, Redhill Drive, Bournemouth. He had bought the house in 1926, and in 1934 he let it to a Mr. Charles for a term of three years certain at a rent of 23*s*. 6*d*. a week. Mr. Charles continued in occupation after the expiry of the three years' term, but at some time in or before 1940, he died, and his widow continued to live in the house. On June 25, 1940, a new oral agreement was come to between the plaintiff and Mrs. Charles whereby she agreed to stay on at a rent originally fixed at 23*s*. 6*d*. a week, but subsequently reduced to 21*s*., the rent being payable every six weeks in advance. At some time after July 14, 1944, the defendant Miss Hartwell, who was a step-niece of Mrs. Charles, went to live with her in the house, and continued to live there down to the hearing of the present action. On July 25, 1944, Mrs. Charles made her will, under which the defendant was

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appointed sole executrix, and was the sole beneficiary. On January 9, 1945, Mrs. Charles died. (At that date the defendant had been residing with her less than six months, so no claim could have been made by her under s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 13 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933). On January 27, 1945, probate of Mrs. Charles's will was granted to the defendant, and at that stage all the rights of Mrs. Charles in the tenancy became vested in the defendant. On June 19, 1945, the present plaintiff started an action for possession against the defendant, which was dismissed on the ground that the contractual tenancy had never come to an end, and that it vested in the defendant as executrix. On June 21, 1945, the plaintiff gave the defendant notice to quit expiring on August 13, 1945, and no question was raised as to the validity of that notice.

On December 27, 1945, the plaintiff started the present action claiming possession of the dwelling-house. The defendant claimed the protection of the Rent Restriction Acts, and the county court judge gave judgment for the defendant. The plaintiff appealed. There was admittedly no question of any of the special grounds on which an order may be made under Schedule I. to the Act of 1933, the sole question being whether the defendant was a " tenant " entitled to protection.

Stephen Chapman for the plaintiff. The short point is whether an executrix taking possession of premises purely in a representative capacity can avail herself of the protection of the Rent Restriction Acts and retain possession as a statutory tenant. Provision is made by s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 13 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, preserving the tenant's interest for the benefit of members of the tenant's family who have been residing on the premises for not less than six months immediately before the death. The defendant was a step-niece of the tenant and cannot be called a member of the family. In any case the defendant was entitled to the premises in question purely as executrix. The whole trend of recent authorities is towards the view that the purpose of the Rent Restriction Acts is to protect a person in possession of a house

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as a home: *Skinner* v. *Geary* (1). That is why a statutory tenancy cannot be claimed by a company: *Reidy* v. *Walker* (2); and a person holding property in a representative capacity is in the same position. The defendant as executrix personifies the deceased and is incapable of residing on the deceased's property as a home. [MORTON L.J. May not the executrix say: "What is it to do with the plaintiff as landlord that "I am occupying as executrix? Someone else may have the "right to turn me out but not the plaintiff."] The defendant can only show title as executrix and in such a capacity she cannot rely on the Acts to enable her to continue in occupation after the notice to quit has taken effect. It is true that the defendant is also the universal legatee but there is no evidence of an assent such as is required by s. 36 of the Administration of Estates Act, 1925.

In *Hiller* v. *United Dairies, Ld.* (3) the Court of Appeal approved *Reidy* v. *Walker* (2). *Collis* v. *Flower* (4) held that an executor, though not in occupation, was protected, but in *Skinner* v. *Geary* (1) that was held to be wrong. The reason it is wrong is, it is submitted, that an executor, qua executor, is not capable of being a person protected by the Rent Acts. [He also referred to *Mellows* v. *Low* (5)]. *Lovibond & Sons, Ld.* v. *Vincent* (6) approves the principle of *Keeves* v. *Dean* (7), and decides that a statutory tenancy cannot be transmitted by will. It proceeds on the basis that a statutory tenancy is a purely personal right of an individual tenant. Let us assume a hypothetical case of a testator ("T"), and executor ("E") and a universal beneficiary ("B"). The following positions may arise: (1.) If T. had a statutory tenancy at his death, nothing is devisable. E. cannot come in at all, and B. could only come in by virtue of s. 12, sub-s. 1 (*g*) of the Act of 1920 as amended (which makes provision for the widow or a member of the family of a deceased tenant). (2.) Where T. had a common law tenancy at his death, on ordinary principles it passes to E., and B.'s right is only a right against E. to a vesting assent at the end of the administration. E. may need to sell the term for the purposes of the administration. If the landlord gives notice to E. terminating the common law tenancy, it comes to an end for all purposes, and B. can only claim protection if he comes within s. 12, sub-s. 1 (*g*), or has come into possession before the giving of the notice. The position is the same even though E. and B. are the same person. They are one individual but in entirely different capacities. The pleadings in the present case are inconsistent with an assent by the defendant as executor to the vesting of the property in her as beneficiary.

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(1) [1931] 2 K. B. 546.
(2) [1933] 2 K. B. 266.
(3) [1934] 1 K. B. 57.
(4) [1921] 1 K. B. 409.
(5) [1923] 1 K. B. 522.
(6) [1929] 1 K. B. 687.
(7) [1924] 1 K. B. 685.

J. T. Molony for the defendant. The defendant up to the date of expiry of the notice to quit, was entitled to be where she was and it would be very surprising if the Rent Restriction Acts did not protect her. The Act of 1920 speaks of a person deriving title from the tenant, and it has never been suggested that a personal representative has been deprived of any common law rights by the Rent Acts.

Assume that the defendant had no beneficial interest, would she have had any protection? On that assumption she would still be "a person deriving title" from the original tenant and would still be in possession. The only difference would be that there might be a beneficiary in a position to say "I now require you to assent to the vesting of the property "in me," but until that happened, an executrix living in the house at the time of the testatrix's death, and at the time of expiry of the notice to quit is entitled to protection.

MORTON L.J. In my view, the decision of the county court judge was right, notwithstanding the skill with which Mr. Stephen Chapman has constructed an argument out of what I regard as being rather unpromising material.

[His Lordship stated the facts, and continued]: On December 27, 1945, the plaintiff started the present action. At the hearing the plaintiff gave evidence as to the history of the matter and no other evidence was called except that the probate of the will was put in and was in evidence. The learned judge dismissed the action. He used the following words in his written judgment: "I hold the defendant is "protected as tenant at common law and in possession, to "whom notice has been given, but who occupies a house "protected by the Rent Act, and against whom none of the "circumstances entitling a landlord to possession against "a protected tenant are alleged."

It is common ground that this house is of such a kind as to come within the protection of the Acts if the defendant is entitled to claim that protection, and it is also common ground

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that if the defendant is entitled to claim that protection no grounds have been shown by the plaintiff which would justify the court in making an order for possession. The whole question before us is: Is the defendant a tenant protected by the Rent Restriction Acts or not?

It is convenient, first, to look at the statutory provisions which are applicable and I think I should first turn to s. 3 of the Act of 1933, which is as follows: "No order or judgment "for the recovery of possession of any dwelling-house to which "the principal Acts apply or for the ejectment of a tenant "therefrom shall be made or given unless the court considers "it reasonable to make such an order or give such a judgment, "and either"—then there are set out certain conditions which have to be fulfilled. I need not read them but, of course, it is necessary for the defendant to satisfy the court that she is a "tenant" within the meaning of the Rent Restriction Acts. I turn next to the Act of 1920, s. 12, sub-s. 1 (*f*): "The expressions 'landlord,' 'tenant,' 'mort-"'gagee,' and 'mortgagor' include any person from time to "time deriving title under the original landlord, tenant, "mortgagee, or mortgagor." I pause there to say that the defendant in the present case cannot bring herself within sub-paragraph (*g*) of that section because, apart from the question (which I need not discuss) whether she could be regarded as a member of the tenant's family, she did not reside in the property for as long as six months before the tenant's death and that period of residence is rendered necessary by s. 13 of the Act of 1933. But prima facie the defendant is "a person deriving title under the original tenant" and is, therefore, within the Act. Mr. Chapman, however, contends that the occupation of the defendant immediately before the expiry of the notice to quit was an occupation purely in her capacity as executrix. He submits, correctly, that the common law tenancy has come to an end and that the Acts give a purely personal right of residence. It has been held in cases to which I need not refer (they are well-known) that that right of residence cannot be assigned nor can it be devised by will. It has also been held that a company cannot claim the protection of the Acts because a company is incapable of residing within the meaning of the Acts. Mr. Chapman submits that a person who holds the property in a representative capacity as executrix is in the same position. I think there is a short and complete answer to Mr. Chapman's argument. The interest of the testatrix in this property vested in the defendant on the death of the testatrix. The defendant became a person deriving title under the original tenant, and, therefore, herself became a tenant under the Acts and the whole legal and beneficial interest in this house was in fact vested in this defendant. No other person had any interest in it whatsoever, legally or beneficially. Lastly, the defendant was genuinely occupying the house as her home or residence.

In these circumstances, it seems to me that the defendant clearly comes within the provisions of the Rent Restriction Acts. But the matter has been very fully and ably argued from another point of view and I do not think it would be right to disregard that argument or to refrain from expressing the views which I have formed on it. For that purpose I propose to assume for the moment that the defendant had no beneficial interest at all in the testatrix's estate. In those circumstances, would the defendant be protected by the Acts ? On the assumption that I have made, the defendant would still be a person deriving title under the original tenant, and in fact the defendant would still be in possession although there would be this difference in the situation, that sooner or later a beneficiary might come along and say " That house was " devised to me and I desire to reside in it. Please assent to " my taking over, and leave the house." But, in the meantime, the position is that the defendant is in the house. In my view, an executrix who is living in the house at the time of the testatrix's death, who is living in the house at the time the notice to quit expires, and who has not up to that time taken any step to divest herself of the interest in the property, does become a statutory tenant.

There is no direct authority on the point, but I think there are passages in the judgment of this court in *Skinner* v. *Geary* (1) which support that view. In that case the plaintiff claimed from the defendant possession of a dwelling-house. It was admitted that the premises came within the scope of the Rent Restriction Acts and it was admitted that due notice to quit had been served and had expired. The defendant denied that the plaintiff was entitled to possession of the premises and pleaded that he was entitled to retain possession by virtue of the Rent Restriction Acts. The facts were these. For a considerable period before 1919 the defendant had been the occupier of the premises as well as the tenant. In 1919 he went to live in a house in another district of which his wife

(1) [1931] 2 K. B. 546.

was the tenant. A married sister of the defendant's wife with her husband then resided at the house in question until June, 1930, when she left, and a sister of the defendant went to live in the house. This sister was residing there when proceedings were begun in the county court. The county court judge found that the defendant was not in actual possession of the premises at the material time—namely, at the time the notice to quit was given—and that he did not retain possession within the meaning of the Rent Restriction Acts by occupation of his wife's or his own relatives, since the purpose of that occupation was not to preserve the house as a residence for the defendant. The county court judge accordingly made an order for possession of the premises. On appeal, the appeal was dismissed on the ground that the fundamental principle of the Acts was to protect a tenant who was residing in the house and that a tenant, to be entitled to the protection of the Act, must be in personal occupation of the premises in respect of which he seeks that protection. Scrutton L.J. pointed out (1) that the right of a statutory tenant was a purely personal right to occupy the house as his home. The learned lord justice then went on to consideration of the case of *Collis* v. *Flower* (2) and said: "In *Collis* v. "*Flower* (2), which it will be noted was decided at a very early "stage in the consideration of the Acts, the tenant of a "dwelling-house died. By her will she appointed an executor. "Another person who resided in the house with her was the "testator's residuary legatee. This person continued to "reside in the house just as she had done while the tenant "was alive. The landlord served a notice to terminate the "common law tenancy upon the executor, who by law was the "person entitled to that tenancy, and brought an action for "possession against both the executor and the residuary "legatee, who was actually living there. The county court "judge held that as there was no assent by the executor to "the residuary legatee remaining there in part satisfaction "of her rights as residuary legatee she was not the tenant, "and that as the executor was not in occupation of the house "he could not claim the protection of the Acts. The "Divisional Court reversed that decision, holding that the "executor was the tenant of the house and entitled to the "protection of the Acts, although he was not in occupation "of the house. In my opinion that decision was wrong for

(1) [1931] 2 K. B. 546, 559, 562. (2) [1921] 1 K. B. 409.

"the reasons I have stated. The executor who had the "common law tenancy which had been terminated by notice "to quit was not in occupation, and in my opinion the original "tenant having no right to dispose of the property by will "could give no statutory right to the executor, who did not "live in the house and who therefore could not claim to be "a statutory tenant." The observation in the middle of the last sentence, in which the learned lord justice says that the original tenant had no right to dispose of the property by will, appears to overlook the fact that at the time of the death of the tenant no notice to quit had been served. I think, for once, Scrutton L.J. possibly made a slip at that point, but that does not affect the matter which is before us for decision. The vital point is that, in my view, Scrutton L.J. thought that the reason why the executor was not entitled to protection was that he was not in occupation, and that if the executor in *Collis* v. *Flower* (1) had been living in the house, he would have been entitled to the protection of the Acts. I think that is a fair inference from the language he has used, and there is nothing in the other judgments which appears to me to be contrary to that view.

I need not refer to the earlier cases to which our attention was directed. The position is that there is no authority for the proposition that an executor who has proved the will, who has not assented to a bequest to someone else, and who is in actual occupation of the house at the termination of the common law tenancy, is not entitled to the protection of the Acts. There is no direct authority the other way, but, in my view, supported as I think by the observations of Scrutton L.J. in the case which I have cited, there is nothing to exclude such an executor from the protection of the Acts. He is a person deriving title from the original tenant and he is in actual occupation of the premises. In my view, this appeal must be dismissed with costs.

SOMERVELL L.J.: I agree.

ASQUITH L.J.: I agree.

Appeal dismissed.

Solicitors for plaintiff: *Walmsley & Stansbury for E. W. Marshall Harvey & Dalton, Bournemouth.*

Solicitors for defendant: *Bell, Brodrick & Gray, for Other, Manning & Allin, Bournemouth.*

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(1) [1921] 1 K. B. 409.

J. W. H.

OCEAN STEAMSHIP CO., LD. *v.* LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION LIMITED.

C. A.

1946
May 10, 13, 14, 15; *June* 4.

Scott, Tucker and Bucknill L.JJ.

Insurance (marine)—War risks—Consequences of warlike operation—Ship damaged through effect of heavy seas on deck cargo—Liability of underwriter—Meaning of "consequences."

A merchant vessel insured against war risks and the consequences of warlike operations was, while under requisition by the Crown, directed to carry a cargo of high military importance by a prescribed route across the North Atlantic in winter. Solely on the ground of the military urgency, the master permitted part of the cargo, including two cases of aeroplane bodies and a tank bridge-layer weighing twenty-one tons, to be carried on the foredeck. The ship encountered heavy weather with the result that the deck cargo broke loose and damaged the hatch-covers, which allowed the hold to become flooded. The master, in order to avoid the possibility of a submarine attack nevertheless maintained a zig-zag course at a high rate of speed during the storm and in the hours of darkness, and as a consequence further water entered the hold and more damage was done. The owners of the ship made a claim on underwriters on the ground that the damage was attributable to the consequences of a warlike operation.

Held, that the damage was brought about by a combination of causes in the course of a warlike operation, such combination being (1.) the deck storage of heavy items of cargo, (2.) the zig-zag course taken in the storm to avoid submarines, and (3.) maintaining speed in the storm during the hours of darkness for the same reason; and that this combination occurring in the course of a warlike operation was a consequence of that warlike operation notwithstanding that the existence of heavy weather was a necessary element in bringing about the harmful results of the combination.

Per Scott L.J.: The word "consequences" in the phrase "consequences of hostilities and warlike operations" does not mean the effects or results of the war peril but is descriptive of perils and, therefore, every happening which arises out of hostilities or warlike operations and every act or thing done for those purposes constitutes a specific war peril consequential on the generic perils named.

Yorkshire Dale S.S. Co. v. Minister of War Transport [1942] A. C. 691 considered.

APPEAL from Atkinson J.

The plaintiffs, Ocean Steamship Co., Ld., insured their motor vessel *Priam* with the defendants, Liverpool and London War Risks Insurance Association, Ld., from June 30 to December 29, 1942, against King's enemies risks and war risks, including the consequences of warlike operations, by or against the King's enemies. The vessel was under requisition by the Crown and was directed to sail from Liverpool to Alexandria, the prescribed route lying north of Ireland, west of the Azores and round the Cape. The *Priam* was a twin-screw motor ship of 10,329 tons gross register, 486 feet in length and 66 feet in beam and was loaded with approximately 6,846 tons of cargo of which 78·5 per cent. were war stores needed for the war in North Africa. The cargo included deck cargo on the forward and after well decks, and, in particular, a bridge-layer tank and two cases of aeroplanes which, with the tank, were stowed on the fore well deck over No. 2 hold. The two cases of aeroplanes were secured on the top of the hatchway of that hold and the bridge-layer tank, which weighed 21 tons and was about 24 feet in length, was secured on the starboard side of the hatchway. The *Priam* was also equipped with a 12-pounder gun mounted on a platform riveted to the forecastle deck. She started on her voyage on December 7, 1942, the master having received orders from the Admiralty as to the course to be taken by him. The normal full speed of the ship was about 17½ knots and she proceeded without escort. The master, in his evidence, said that his great fear was of a submarine attack and that he considered speed his greatest safety. He therefore carried on with all speed, zig-zagging continuously. He also stated that he was very reluctant to take the deck cargo on a voyage in mid-winter which required him to navigate well out into the North Atlantic. About 4 p.m. on December 7 the ship ran into bad weather and started to ship water forward. She continued at full speed until December 8, when it was reduced to a speed just sufficient to give her steerage way. The master said that in normal circumstances he would have reduced his speed as soon as the ship began to take heavy water on board but that he carried on at speed because he was looking out for torpedoes and was therefore maintaining all possible speed under all conditions of weather. At 11 a.m. on December 8 a sea struck the two aeroplanes on No. 2 hatch causing the containing cases to collapse and they see-sawed across the hatchway tearing the upper tarpaulins. They were secured with extra lashings, and, the wind having moderated, speed was increased. At dawn on December 9 it was seen that the tarpaulins on No. 2 hatch were badly torn; that some of the short hatch covers were missing and that the bridge-layer tank was adrift. The cases of aeroplanes and the bridge-layer tank were secured and the hatchway was refitted with spare hatchway covers and tarpaulins. Soundings of No. 2 hold gave 11 feet of water which had entered through the opening left by the missing hatch covers. The pumps were unable to pump much of the water out of the hold as they were constantly being choked with shavings from broken packages. The ship remained down by the head throughout December 9 as the result of the water in the hold, but notwithstanding this the master steamed at 100 revolutions until 2 a.m. on December 10 when he reduced to 60 owing to the gale and rough sea. On that morning the windlass motor room was found to be flooded with sea water. On the morning of December 12, in very bad weather, the bridge-layer tank again became adrift and crashed across No. 2 hold completely stripping the after end of the hatch of its covers, and much more water entered No. 2 hold. She was down by the head by about 11 feet 7 inches and the forward well deck was completely awash and even the higher forecastle deck was frequently under water in the weather prevailing. Eventually the master succeeded in navigating the *Priam* to Freetown where the cargo in No. 2 hold was discharged.

The damage to the ship amounted to 1,632*l.* 10*s.* 0*d.*, which sum the plaintiffs claimed from the defendants on the ground that it was caused by "the consequences of warlike "operations." The defendants alleged that the damage was caused by a peril of the seas and not by a risk insured against. Atkinson J. held that the effective and predominant cause of the damage was the open hold of the vessel, which peril was caused by the breaking loose of the deck cargo and aggravated by the necessity for maintaining speed; that in both these respects the damage was the consequence of the warlike operation and that the plaintiffs were entitled to recover.

The defendants appealed.

Devlin K.C. and *H. L. Parker* for the defendants. Atkinson J. was wrong in holding that the damage to the plaintiffs' vessel was a consequence of the warlike operation in which she was engaged. Not every accident which happens to a ship in the course of such an operation is a consequence of it. It is the proxima causa, the efficient and predominant cause, which must have come to pass as a consequence of the warlike operation, which must be regarded. In the present case the insurance was against the consequences of a warlike operation and not the consequences of war-time conditions. The proximate cause of the damage was the heavy weather and nothing else. It is true that the carriage of the deck cargo was not characteristic of a peace-time voyage, but such carriage was due, not to the fact of a warlike operation, but to the general necessity of using all available space on every kind of merchant ship. (They referred to *Yorkshire Dale S.S. Co.* v. *Minister of War Transport* (1) and to the earlier decisions considered by the House of Lords in that case.)

Bateson K.C. and *A. J. Hodgson* for the plaintiffs. The real and efficient cause of the damage was the placing of the aeroplane cases and the tank bridge-layer on the deck of the vessel. This was done by the deliberate act of the master as part of the warlike operation and was necessitated thereby. That, and the speed maintained and the zig-zag course adopted by reason of the fact that the ship was engaged in a warlike operation were the efficient causes of the damage. Admittedly, in one sense, the heavy seas were responsible for that damage since it was sea water which caused the aeroplane cases to collapse and threw the cargo about and damaged the hatch covers with the result that the sea invaded the hold and did damage which resulted in injury to the hull. But the court must look to see what was behind the sea as the cause of the trouble. In normal circumstances the rough sea would not have had any of these consequences because it only harmed the ship by attacking the deck cargo which was being carried solely in pursuance of the warlike operation. Even then, no serious consequences would have ensued but for the necessity of maintaining speed despite the heavy weather and of pursuing a zig-zag course in order to avoid submarine attack. The rough sea, although a causa sine qua non was not the proximate cause of the damage. The warlike operation here was the proceeding from one war base to another with military stores, part of which were carried on deck, by a route and in a manner designed as a protection against possible submarine attack. On the principles enunciated in the speeches in the House of Lords in *Yorkshire Dale S.S. Co.* v. *Minister of War Transport* (1) the decision of Atkinson J. was right.

Devlin K.C. in reply.

Cur. adv. vult.

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(1) [1942] A. C. 691.

June 4. The following judgments were read:

SCOTT L.J., after stating the facts said that it was rightly conceded by the defendants that the voyage of the *Priam* was a warlike operation and continued: The nature of the damage may be conveniently classified under these heads:—(1.) damage directly due to the breaking adrift of the deck cargo, such as damage to the hatch tarpaulins and covers, damage on the fore well deck and damage in No. 2 hold; (2.) damage to the fittings, etc., on the forecastle deck, to compartments under that deck and other compartments forward of No. 2 well deck including the motor windlass room; (3.) damage to the centre castle and to the ship abaft the centre castle; (4.) damage caused by the explosion of some fuses in No. 2 hold probably on December 15.

Mr. Devlin argued that damage falling under heads (2.) and (3.) were caused by heavy weather and had nothing to do with the deck cargo, and that even the damage done by the deck cargo under head (1.) was also proximately and solely caused by heavy weather. In my opinion the damage under the first head was clearly caused by the breaking adrift of the deck cargo. No doubt the damage would not have been done unless the ship had also encountered heavy weather, but the predominant and effective cause of this damage was the breaking adrift of the bridge-layer tank and the two cases of aeroplanes on the fore well deck.

As regards the second head of damage, the learned judge said that he accepted the evidence that the damage due to the flooding of the windlass motor room would not have happened unless the vessel had been down by the head and been driven unduly fast against the seas. I agree with this finding. There is no evidence, based on actual observation, as to when this damage was done, but all the probabilities appear to me to indicate it was done after the ship got down by the head and shipped heavier seas forward from which she freed herself more sluggishly. There was a certain amount of leakage into the windlass motor room from the started rivets of the gun platform, but this would not account for the flooding of the compartment. As regards the damage to these rivets, the learned judge has apparently excluded the damage to the gun platform, possibly on the ground that the Admiralty had already made it good. The plaintiffs included it and the resulting damage due to the started rivets as part of their claim, and in my view this damage was most probably done after the water got into No. 2 hold and the ship got down by the head.

As regards the third head of damage this was done by seas shipped during the heavy weather but there is no evidence to establish the particular time between December 8 and 15 when it was done or when the damage was first discovered. The first entry in the log of the *Priam*, shipping heavy water over all, is at 8 a.m. on December 8. The master in his evidence said that he considered that " the damage on the " poop and after well deck was due to the heavy weather and " zig-zagging," meaning, we are satisfied, by exposing the ship to heavy beam seas as she turned. It may therefore have been done on the 8th.

As regards the fourth head of damage, this explosion clearly occurred after No. 2 hatch had been damaged by the deck cargo breaking adrift and the hold became flooded and the fuses began to be washed about.

The question now arises whether all or any part of this damage was in a legal sense, caused by the perils insured against. The plaintiffs expressed their argument in two alternative ways. In the first place they argued that the voyage of the *Priam* was a warlike operation and that damage occurring during the progress of such a voyage in steaming through the seas in performance of the operation was a direct consequence of that operation. If wrong in that contention, they argued secondly that the special circumstances of the *Priam's* particular warlike operation showed that the damage claimed was caused by it, for the special circumstances disclosed at least three respects in which this warlike operation of the *Priam* differed from a normal peace-time voyage from Liverpool to the Cape—(I.) the ship carried war stores as deck cargo on the fore well deck which she would not have normally done ; (2.) she proceeded right out into the North Atlantic and off her normal course ; (3.) she proceeded at a higher speed in bad weather than she would normally do.

As regards the plaintiffs' first contention, Atkinson J. said he took the view that damage caused to a ship by heavy weather while engaged in a warlike operation was not a consequence of that operation in the absence of any special circumstances. The learned judge, however, said it was not necessary to decide the case on the first issue because he considered that the plaintiffs succeeded on their second contention. On this, he said in effect that there were two such special circumstances, first the carrying by the *Priam* of this heavy deck cargo of war stores on this voyage in winter across the Atlantic and, secondly, that she was driven at a speed in excess of her normal speed in heavy weather because of the requirements of the army in the field; and that those two aspects of the *Priam's* warlike operations were the real cause of the damage. Subject to a minor correction on the second, I agree with both conclusions, but with great respect to the learned judge I do not think the evidence justifies a finding that the reason why the master pressed the vessel into the wind and waves to a greater extent than he would have done in peace-time was because of the requirements of the army in the field. I do not find in the ship's log or the master's report or indeed in the master's evidence any statement that he was hurrying because of the immediate need of this cargo by the army. On the other hand it is quite clear from his evidence that at times he pushed her at a higher speed and hove her to and ran before the wind less often and for shorter periods than he would have felt prudent in peace-time, but it was because of his fear of enemy submarines. For the same reason he zig-zagged at a time when by so doing he increased the danger of shipping heavy beam seas on both well decks and the poop. But all such features of the voyage were just particular steps taken in order to carry out the warlike operation, or as a defence against the enemy's hostilities, just as much as the mounting of the gun in the bows. They were all consequential on " hostilities " or warlike operations " because, for those purposes and in that true sense, they were " consequences of hostilities or " warlike operations."

As regards their second contention I think that this is a stronger case than the *Yorkshire Dale S.S. Co.* v. *Minister of War Transport* (1) inasmuch as the *Priam* had on board at all material times a potential danger and source of damage to herself in the presence of the bridge-layer tank and the two cases of aeroplanes on the fore well deck. This was a deliberate addition to the dangers of the warlike operation in which the *Priam* was taking part, namely, the carriage of war stores to the battle area. If the *Priam* had been carrying a mine on her deck and it had exploded in consequence of a heavy sea striking it, I think it could hardly be suggested that the damage to the ship resulting from the explosion was not caused by the warlike operation, in which the ship was

(1) [1942] A. C. 691.

engaged. I can see no substantial difference so far as the safety of the ship was concerned, between the stowage on the deck of the bridge-layer tank on this particular voyage, and the stowage of a mine. In either case, for reasons which I will state in a moment, I regard the carriage of that deck cargo and its stowage as "consequences" of the "hostilities" in which the British Empire was engaged, or of the "warlike "operation" in which the *Priam* was engaged.

In my view the damage was not caused by "a definite "external event, unexpected and unavoidable" to quote the words of Lord Porter in *Yorkshire Dale S.S. Co.* v. *Minister of War Transport* (1). A heavy gale in the North Atlantic in December is not unexpected. The weather was undoubtedly very severe and prolonged, but it caused no damage to the ship until the deck cargo on the fore well deck got adrift. It is not as if the *Priam* encountered an unexpected tidal wave or a typhoon which caused the deck cargo to break adrift. The *Priam* was an "active participant" and not a "quiescent "sufferer" in the matter because she was at all material times under way and under command and was doing her best to continue her warlike operation under adverse conditions.

There is very little if any of the damage claimed which was not directly caused by the stowage on the No. 2 deck of the aeroplanes and bridge-layer. But if there was any, it was in my opinion still caused by the insured perils. And in that context there is one point in the interpretation of war risk policies in the present form—and the phraseology of the present form is practically universal—which I think throws light on what up to now has been the most controversial arena in the interpretation and application of war risk policies. The policy on the *Priam* for all relevant purposes is in the same terms as the insurance in the case of *Yorkshire Dale S.S. Co.* v. *Minister of War Transport* (2), to which for brevity I shall refer as "the *Coxwold*," the name of the ship there under discussion. The insurance contract there was contained in a particular clause in the charterparty on the terms of which that ship had been requisitioned; but it was agreed in all courts that it was to be treated as an insurance policy. Its language was in common form—an insurance agreement against "the consequences of hostilities and warlike operations." It therefore possessed one important feature, equally common to all or nearly all war risk policies, viz. :—that the risks

(1) [1942] A. C. 691, 719.

(2) Ibid. 691.

covered by the insurance were expressed to be co-extensive with the risks excepted from the marine risk policies by the f.c. and s. clause or its equivalent. That feature is important as it shows that all the words in the phrase "the consequences "of hostilities or warlike operations," itself normally characteristic of the f.c. and s. warranty, are descriptive of and relate solely to the perils, whether insured, or excluded, and to nothing else; and therefore that it has no bearing on, or concern with, the different question of whether the loss was proximately caused by the insured peril. That separate question has always had to be answered, whether at common law before the Marine Insurance Act, 1906, or since the Act in s. 55, sub-s. 1, which is merely declaratory of the common law and says: "Subject to the provisions of this "Act, and unless the policy otherwise provides, the insurer is "liable for any loss proximately caused by a peril insured "against, but, subject as aforesaid, he is not liable for any "loss which is not proximately caused by a peril insured "against." In the above phraseology describing the war risks, whether for exclusion from the marine policy, or for inclusion in the war policy, the two words "the consequences" constitute an extension or at least an elucidation of the words "hostilities or warlike operations," possibly added by an early draftsman ex majore cautela, in order to make sure that the general words should not be construed in too narrow a sense. In strict logic it may be said that the additional mention of any number of species adds nothing to the genus, and therefore that the words "the consequences" add nothing to "hostilities "and warlike operations." But the draftsman may have been a business man and not a logician and thought it safer that every thing consequential on either of the generic perils should be covered as a specific peril. At any rate that seems to me the natural sense of the language used. If so, it follows that the word "consequences" does not mean effects or results of the war peril. This question of construction is important just because it is so easy to slip unconsciously into treating the word "consequences" in the phrase "consequences of "hostilities and warlike operations" not as itself a named peril, but as the loss or damage consequential on—i.e., *caused by* —a named peril.

It may be urged that this criticism of the loose use in thought, and even in judgments, of the word "consequences," without distinguishing between its two insurance senses, is academic and of little legal import; but I do not agree. Once the true interpretation is recognized, namely, that the word "consequences" in the established phrase is descriptive of perils and therefore that every happening which arises out of hostilities or warlike operations and every act or thing done for those purposes constitutes a specific war peril "consequential" on the generic perils named, the causal nexus between peril and loss becomes clearer, just because the particular happening, or act, is nearer to the loss; the cause is more obviously "proximate," in the sense given to that word in the decided cases. If so, the above interpretation does seem to me to be helpful for the light it throws on the final inquiry, namely, whether the loss or damage claimed was proximately caused by an insured peril. On the facts of the present case, there is I think no doubt that one such "consequence" of the warlike operation (in my sense of the insured peril) was the stowage, for the purpose of the warlike operation, on No. 2 well deck, of certain military cargo of a kind, and in a manner likely, on the intended voyage in North Atlantic winter weather to do damage to the ship. That act of stowage and the consequential carriage of that cargo in that position, were both acts done by the assured in furtherance and, therefore, consequential on the admittedly warlike operation undertaken by the assured. Each was thus "a consequence of the warlike operation" of the *Priam* and insured specifically eo nomine; and so far as that stowage was the cause of the damage which resulted therefrom to the ship, the assured's case is thereby established.

It remains to consider the authorities. The terms of the war risk policy sued on in the present action are for all relevant purposes the same as those of the indemnity clause in the government charter of the "*Coxwold*." The decision of the House of Lords in that case as to the meaning of those terms is therefore directly binding on this court in the present appeal; but there is nothing in that decision contrary to my construction of the policy. The decision was unanimous that the stranding of the "*Coxwold*" in the course of the warlike operation upon which that ship and other vessels of the same convoy were engaged was proximately caused by the peril insured against. But in the present appeal both sides prayed in aid different passages in the five opinions in the case of the *Coxwold* in the House of Lords, and the first duty of this court is to analyse those opinions in order to see exactly what principles of interpretation of such a policy as that presently before us, were expressly formulated or necessarily involved in the reasoning of their Lordships, if unanimous, or of the majority, if there was not unanimity in their reasoning. Counsel before us suggested a greater divergence of views amongst their Lordships than I can detect—and it is of course more important for us to concentrate on the broad identity of the reasons upon which their unanimous decision rested than on divergences of expression or even of individual views. It may help if I, as president and surviving member of the court which went wrong in that case, try to bring out the exact nature of our error. There is no doubt that we thought we were resting our judgments on the broad principle that the mere happening of a marine casualty *during* a warlike operation is not of itself proof that the warlike operation caused it. I, at any rate, then regarded an unexpected set of the tide as in no insurance sense different from unexpectedly bad wind and sea; both may happen equally whether the "operation" on which the ship is engaged, is warlike or peaceful. For that reason I (erroneously) thought that the necessary causal connexion between the warlike operation and the loss was absent. In taking that view we did not attach sufficient weight to the important consideration, much discussed subsequently in the opinions of their Lordships in the House of Lords, that the mere prosecution of the warlike operation, upon which the convoy and each ship in it were alike actively engaged, may have been, in the marine insurance sense, the cause of the stranding. Of the specific order to the *Coxwold* to deviate to starboard for the purpose of avoiding an enemy submarine reported to be in the neighbourhood, we took no notice because we did not think it had any more causal significance than the general orders to the convoy to execute the warlike operation on which it was engaged.

Although the House in the *Coxwold* were unanimous in their final conclusion, I humbly think that there was some divergence of opinion or at least of expression between Lords Simon L.C. and Macmillan on the one hand and Lords Atkin, Wright and Porter on the other, on the question of how far the general "war operation" of such a voyage as that of the *Priam* can be regarded as the cause of casualties occurring during it. On the question of the tidal set and the order to starboard the Lord Chancellor said this (1): "There is no

(1) [1942] A. C. 691, 696, 699, 701, 703, 704.

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"finding that the tidal set was the proximate cause of the "stranding. Reading the findings in the case as a whole, "I deduce that the arbitrator's view was that, though the "tidal set would have brought the vessel nearer to the land "than she would otherwise have been, it was the combination "with this of the alteration of course, ordered for the avoidance "of an enemy submarine and persisted in for half an hour "without subsequent correction, which was the effective "explanation of the disaster." A little lower down he said: "Authority is hardly needed for the proposition that you do "not prove that an accident is 'the consequence of' a warlike "operation merely by showing that it happened 'during' "a warlike operation." Later he treated the order to starboard, in order to avoid an enemy submarine, as strongly supporting the arbitrator's award. Lord Macmillan said: "I think that the ordinary man, if asked what caused the "casualty, would reply that it was caused by the vessel, in "obedience to orders from the commodore of the convoy, "deviating from a safe course in order to avoid a suspected "enemy submarine." On the other hand Lord Atkin said: "I do not myself think that in the present case the deter-"mining factor is the change of course to avoid a submarine "danger." His view was that "If the warlike operation "includes the direction of the war vessel through the water "from one war starting point to another war destination, it "seems to remain true that almost every casualty to a ship "during such an operation will be the consequence of a "war operation. Not all, for there may be circumstances "of accident on board or the result of wind and wave that "may not come within the definition, though I should "find it necessary to know all the facts relating to a suggested "accidental fire or a suggested great wave before I was "able to draw the line. But, if in the course of a warlike "operation the direction of the ship's course against another "ship is a consequence of a warlike operation: *Attorney-"General* v. *Ard Coasters, Ld.* (1), it is surely impossible to "distinguish the case where the course of the ship is directed "against a rock and this whether negligently or without "negligence, and whether the ship is deflected by tide or current "or wind." His general view, thus expressed, of the causal nexus between the insured peril and the loss was, at any rate within very wide limits shared by Lords Wright and Porter.

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(1) [1921] 2 A. C. 141.

Lord Wright after a reference to decisions of the House arising out of the war of 1914–18 with which he dealt at length later in his opinion, said (1): "if the damage was caused by the "action of the vessel in executing a warlike operation, it should "on the decisions of this House be classed as a consequence "of a warlike operation." After quoting Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co., Ld.* (*The Warilda*) (2), he said: "The warlike operation is, as it were, "an umbrella which covers every active step taken to carry "it out, including the navigation, the course and helm action "intended to bring the vessel to the position required by the "warlike operation, and that none the less because accident or "mischance or negligence leads to stranding or collision. "No doubt, a wilful act such as barratry or scuttling would "raise different questions." He then proceeded to trace in the decisions of the House from 1921 onwards on the interpretation of war risk clauses, the gradual emergence of the recognized principle that the active prosecution of the warlike operation, in whole or in part, should generally speaking be regarded as in fact causing any casualties arising out of it. He however recognized certain exceptions or rather limitations indicated by him in the last paragraph of his opinion. They demonstrate the difficulty of drawing a clear line of principle between what is and what is not a causal result of a "war operation."

It is just on this difficulty that I venture to think that my point upon the interpretation of the policy is helpful. All the various perils insured against in a war risks policy, as of those excepted by an f.c. and s. clause from an ordinary marine policy, are generically covered by the one phrase "the "consequences of hostilities and warlike operations." "Hostilities" and "warlike operations" are not introduced as separate and specific perils: indeed it is only their "consequences" which the policy purports to insure; and the only task in any particular dispute is to ascertain whether some particular "consequence" of hostilities or warlike operations was the proximate cause of the loss; the word "consequence" in that context ex hypothesi in the policy not meaning effect, but cause. Its use by the draftsman has, however, naturally tended to obscure the whole discussion, just because the word "consequence" usually means effect and not cause. Even in the language of the noble Lords in the relevant cases in their House, the word " consequence " is not infrequently quoted as referring not to the peril, but to the result, caused by the operation of the peril. I venture humbly to think that if one keeps one's mind on the true insurance interpretation, namely, that " the consequences " of warlike operations " is just a description of one wide category of perils, with particular aspects of them covered by the word " consequences," contained in the full Lloyd's policy pari passu with perils of the seas, but excepted by the f.c. and s. clause, it helps to a clearer understanding of the contrast to be drawn between the causal effect of any one insured peril and a loss or damage received casually during, but not caused by, any one of the insured perils. I think what Lord Wright says illuminates what I have just been trying to express. After saying that he saw no reason for carrying the principle of treating every sort of damage by sea perils as " a consequence " of the warlike operation " of the vessel and adding that he saw no reason for carrying the principle further than the cases have carried it he added : " In particular, it might plausibly " be said that, if she were deliberately forced at full speed " ahead when a prudent navigator would heave to, or deliberately taken in the area of a cyclone for some warlike purpose, " resulting damage would be a consequence of warlike operations." He then said : " There are, however, I think, " obviously some damage claims in the case of a requisitioned " ship while engaged on a warlike operation which do not " come within the war risk provision. Thus, a fire accidentally caused on board, or accidents within the Inchmaree " clause, or leaks due to inherent defects in the hull, would not " seem to me, as at present advised, to come within the war " risk cover in any event." He said then : " The basis of the " decisions seem to be that the casualty can be traced to " definite action on the part of those on board the warship or " quasi-warship (if I may use that term) in directing the course " of the vessel to carry out the warlike operation. Such " instances of damage as I have just given seem to me, as at " present advised, to fall outside the rule. What is being " discussed is not a general principle of law, but the construction of words which have been in common use during the " last war and this war." My interpretation of the word " consequences " comes within his last sentence which I have just quoted.

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(1) [1942] A. C. 691, 712, 713. 714, 715.

(2) [1923] A. C. 292.

It follows from what I have said that in a war risk case, if the loss or damage in question was immediately due to damage done by wind and weather, or heavy seas, or a collision, or a stranding, or any other peril of the sea, then a proper question to ask is did the sea peril operate by reason of one or other of the named perils included in " the consequences " of hostilities and warlike operations ? And the law to apply to that question is the rule laid down in *Reischer* v. *Borwick* (1) and *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (2). The former was an insurance against " collisions with any object." The ship had such a " collision " and a hole was made in her. It was patched up, but perils of the seas subsequently caused the wound to reopen, and a loss resulted. Held, that the loss was proximately caused by collision as well as by perils of the sea and in effect that there can be two proximate causes of a loss, simultaneously operating. In the *Norwich Union* case (2) the insured ship had a hole made in her below water by an enemy torpedo in the English Channel. She was successfully navigated into the harbour of Le Havre, but days later, before she had been repaired, a heavy storm blew up and caused her to sink in the harbour. The House of Lords held that she was lost by the war peril, as the hole made by the torpedo was her death wound. It follows from these two decisions that although the final cause of loss is a peril of the sea, if it was the condition of the ship due to a war peril which made her succumb to the sea peril and thereby suffer loss or damage, that loss or damage is in an insurance sense proximately caused by the war peril. That view is shortly stated in Halsbury (2nd ed.) Laws of England, vol. 18, pages 305–6 in s. 430. As I had editorial responsibility for that passage, but am not dead, I do not quote it as an authority : but I think it is correct, subject to the qualification that it may become necessary to consider which was the predominant cause—as for instance if the assured being in doubt sues both sets of underwriters as co-defendants, in the alternative.

If one concentrates, not on the question " was the proximate " cause of loss a war peril ? " but rather on the question " was the state of affairs, which in fact brought about the loss, " itself consequential on the hostilities in which the British " Empire was engaged, or on the warlike operation on which " the ship was engaged ? " I think one gets a rather simpler and easier criterion as to whether a particular item of damage

(1) [1894] 2 Q. B. 548.

(2) [1918] A. C. 350.

is or is not proximately caused by the war peril, than if one asks "are there any special circumstances which take the "case out of the rule that what merely happens during a warlike "operation is not caused by the warlike operation?"

In my view the whole of the damage claimed was proximately caused by "consequences of hostilities or warlike operations" within the meaning of the policy. And in this view I find direct support in the language of Lord Greene M.R. in *Athel Line, Ld.* v. *Liverpool & London War Risks Insurance Association, Ld.* (1) in spite of his apparent use of the word "consequences" in what I think is an erroneous sense. In that case the late MacKinnon L.J. who had been with me party to the decision in the *Coxwold* which the House of Lords reversed, recognized that the decision of the House compelled him to agree with the Master of the Rolls. Tucker L.J. also agreed. The *Atheltemplar* on a voyage to Scapa Flow with fuel oil for war purposes was engaged upon a warlike operation. In the course of the voyage she anchored temporarily at Lochalsh, but happened, unfortunately as the tide fell, to sit upon a rock and damaged her bottom. There was a war risk policy in the same terms as that of the *Priam* in the present appeal. Underwriters contended that the cause of the damage was not an insured peril for two reasons. (1.) The first was that the voyage of the ship, a merchant ship, was not a warlike operation. (2.) The second, if they were wrong on the first (as they obviously were) was that the warlike operation was in suspense whilst the ship was at anchor, because a warlike operation presupposes continuing movement of the ship through the water, i.e., what they called some "action" in prosecution of it. Lord Greene disposed of both contentions. Neither is relevant to the present appeal, but in his judgment he attributed to the word "consequences," in the stereotyped phrase describing the war perils (as indeed did some of their Lordships in the *Coxwold*) the interpretation, which I have in this judgment, humbly submitted is erroneous. In doing so he was repeating the language used in the award of the arbitrator. That case affords a clear illustration of the way in which the problem, so much discussed in the *Coxwold* and all the decisions there discussed and analysed, is simplified by giving the word "consequences" in the list of perils its proper meaning. If this court had treated the temporary anchoring of the *Atheltemplar* as an act consequential upon the ship's warlike operation, insured as a particular peril, it would have made the underwriters' case plainly unarguable. My point of interpretation does not make the war underwriter's contention in the present appeal as obviously unarguable as in the *Atheltemplar*; but it does to my mind facilitate the decision to which we have all arrived that this appeal must be dismissed; and I am quite certain that it would have prevented me going wrong in the *Coxwold* had I then thought out this question of construction.

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(1) Ante p. 117.

The appeal is dismissed with costs.

TUCKER L.J. I agree as to the facts and inferences to be drawn therefrom stated in the judgment which Scott L.J. has delivered. They are, I think, with one slight modification in substance the same as the findings of Atkinson J.

I also agree that on these findings the damage so caused was as a matter of law the consequence of warlike operations within the meaning of this policy of marine insurance. The authorities on this matter have recently been fully discussed in the *Coxwold* (1) and the results of the previous decisions were there summarized by Lord Porter. Consequently I do not consider it necessary to refer to any of the earlier cases. In the *Coxwold* (1) Viscount Simon L. C. propounded the problem in these words:—"The relevant contrast is not, strictly "speaking, between marine risks and war risks. The *Coxwold* "accidentally stranded, that is to say, she was proceeding "through the sea when the water under her bottom became too "shallow to keep her afloat and she consequently ran aground. "No misfortune could be more marine than this, but the "question here is not whether this was a marine risk "but whether, granting that stranding is a marine risk, this "stranding is not to be regarded as the 'consequence of warlike "'operations.' That, in my opinion, depends on whether, "in the practical sense in which a policy of insurance must be "interpreted and applied the 'dominant' or 'determining' "cause of the disaster was the warlike operations. The "interpretation to be applied does not involve any meta-"physical or scientific view of causation. Most results are "brought about by a combination of causes, and a search for "'the cause' involves a selection of the governing explana-"tions in each case." Applying this test to the facts of the present case it appears to me that the damage was brought

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(1) [1942] A. C. 691, 697.

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about by a combination of causes occurring in the course of a warlike operation. The combination of causes were: (1.) deck stowage of the bridge-layer tank; (2.) the zig-zag course taken in the storm to avoid submarines; (3.) maintaining speed in the storm during the hours of darkness for the same reason when the vessel would otherwise have remained "hove-to." This combination occurring in the course of a warlike operation was, in my view, a consequence of that warlike operation notwithstanding that the existence of heavy weather was a necessary element in bringing about the harmful results of the combination. In the *Coxwold* case several of the learned Lords referred to and reserved for future decision the question of damage attributable to heavy weather, but I cannot find in their opinions anything which points to the conclusion that the mere existence of heavy weather as a contributory cause is decisive against the view that the resulting damage may none the less be the consequence of warlike operations.

In my view the correct approach in every case must be to ascertain all the circumstances and to balance all the contributory causes. Heavy weather is one of the circumstances to be considered and may in some cases be one of the contributory causes to be weighed in the balance, but it seems to me fallacious to seek to put it in a separate category by itself, and say its presence as a factor is necessarily conclusive, or is conclusive in the absence of some special or peculiar circumstances. I do not regard this case as one which presents any special or peculiar features distinguishing it from some general or normal type of "heavy weather" case, but the facts as a whole seem to me to point to the conclusion that this damage, to which the marine misfortune of heavy weather contributed and without which it would not have occurred, was the consequence of the warlike operation upon which the *Priam* was engaged.

SCOTT L.J.: Bucknill L.J. has asked me to say that he agrees with the judgments which have been delivered.

Appeal dismissed.

Solicitors for the plaintiffs: *Bentleys, Stokes and Lowless, for Alsop, Stevens and Collins Robinson, Liverpool.*

Solicitors for the defendants: *Hill, Dickinson and Co.*

P. B. D.

LEATHLEY *v.* JOHN FOWLER & COMPANY LIMITED.

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May 31; *June* 3, 25.

Scott, Somervell and Cohen L.JJ.

Workmen's compensation—Injury to workman—Alternative remedies—Receipt of weekly payments as compensation—Without knowledge of option to claim damages at common law—Claim not barred—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1.

A workman's claim at common law is not barred under s. 29, sub-s. 1 of the Workmen's Compensation Act, 1925, by the acceptance of payments (whether claimed or not) known by him to be compensation under the Act, if the recipient was ignorant, at the time of the receipt of the payments, of the option conferred on him by the sub-section.

Principle enunciated by the majority of the Law Lords (Viscount Simon, Lord Russell of Killowen and Lord Porter) in *Young* v. *Bristol Aeroplane Co., Ld.* [1946] A. C. 163, applied.

Selwood v. *Townley Coal & Fireclay Co., Ld.* [1940] 1 K. B. 180, not followed.

APPEAL from Oliver J.

The plaintiff sued the defendants, his employers, for damages for negligence and breach of statutory duty. Oliver J. found that (1.) the plaintiff, subsequent to his injury, had received weekly payments from the defendants from December 18, 1943, to May 13, 1944; (2.) the plaintiff knew the payments were for compensation under the Workmen's Compensation Act, 1925; and (3.) at the time of the acceptance of the payments, the plaintiff was ignorant of his rights at common law and was unaware that by accepting the payments he would prejudice any right he might have. At the time of the trial, in February, 1945, *Young* v. *Bristol Aeroplane Co., Ld.* (1) had been decided in the Court of Appeal, but an appeal from that decision to the House of Lords was pending. Counsel for the plaintiff admitted that as the law then was, by reason of the first two findings of the judge the plaintiff's claim was barred by s. 29, sub-s. 1 of the Workmen's Compensation Act, 1925 (2); but he formally submitted that the

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(1) [1944] K. B. 718.

(2) By s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925:—"When the injury was "caused by the personal negligence "or wilful act of the employer "or of some person for whose "act or default the employer is "responsible, nothing in this "Act shall affect any civil liability "of the employer, but in that case "the workman may, at his option, "either claim compensation under "this Act or take proceedings "independently of this Act; but "the employer shall not be liable

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decision of the Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ld.* (1) was wrong, in case the House of Lords might lay down a different principle which might make his Lordship's third finding relevant. Accordingly, Oliver J. held that the plaintiff's claim was barred and the plaintiff appealed.

Streatfeild K.C. and *Myles Archibald* for plaintiff. As the law stood at the date of the trial of the present action early in 1945, the acceptance by the workman of payments made under the Workmen's Compensation Act, 1925, with the knowledge that they were such, barred him from his common law remedy, whether or not he knew that he had or might have an alternative remedy: *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2); *Selwood* v. *Townley Coal & Fireclay Co., Ld.* (3); *Young* v. *Bristol Aeroplane Co., Ld.* (as decided by the Court of Appeal) (1). But, on appeal to the House of Lords in the last mentioned case (4), the House, although they decided against the workman on the particular facts of that case, on the ground that he continued to accept payments under the Act after he knew that he had an alternative remedy, in effect, by a majority of three to two, disapproved of *Selwood's* case (3) and of the reasoning in *Perkin's* case (2) and held that a workman must not be deemed to have exercised his option under s. 29, sub-s. 1, of the Act unless he personally knew that he had an alternative remedy. In the present case the judge found that, at the time of receiving payments of compensation under the Act, the plaintiff was not aware of his rights at common law or that his acceptance of such payments would bar him from exercising those rights. The mere fact, therefore, that he received compensation knowing it to be compensation under the Workmen's Compensation Act, 1925, ought not to be held to amount to the exercise by him of his option under s. 29, sub-s. 1, and this appeal should be allowed. [Counsel also referred to *Vaughan* v. *Tentest Fibre Board Co., Ld. and Another* (5).]

Fenwick K.C. and *Hylton-Foster* for defendants. Up to

" to pay compensation for injury " to a workman by accident arising " out of and in the course of the " employment both independently " of and also under this Act, and " shall not be liable to any proceedings independently of this " Act, except in case of such personal negligence or wilful act as " aforesaid."

(1) [1944] K. B. 718.

(2) [1940] 1 K. B. 56.

(3) [1940] 1 K. B. 180.

(4) [1946] A. C. 163.

(5) (1941) 34 B. W. C. C. 133.

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the decision of the House of Lords in *Young* v. *Bristol Aeroplane Co., Ld.* (1), the construction of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, on this issue was settled by *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2); *Selwood* v. *Townley Coal and Fireclay Co., Ld.* (3) and *Young's* case in the Court of Appeal (4). The acceptance of compensation known to be such under the Workmen's Compensation Act, 1925, precluded an action for damages at common law against an employer. The workman had exercised his option to claim compensation under the Act and he could not take proceedings independently of the Act. And this is the law to-day. The situation of fact in Young's case (1) was that Young received weekly payments from April to October, 1942, knowing them to be compensation under the Act, but it was shown that since July, 1942, he had been aware of the option given to him by the subsection. On those facts, the five Law Lords agreed that Young was debarred from proceeding with his action at law: the decision was that the case was rightly decided in the Court of Appeal. The observations of the Law Lords on the construction of the sub-section were obiter, not being necessary for the determination of the case and those of the minority (Lords Macmillan and Simonds) are preferable, that Young was debarred from bringing his action by the acceptance of compensation under the Act, knowing it to be such, whether or not, when he received it, he knew of his alternative remedy. If I were not precluded by authority, on the words of the subsection (see *Bennett* v. *L. & W. Whitehead, Ld.*) (5), I should contend that a workman by the very making of a claim for compensation under the Act, precluded himself from suing at common law. See the terms of ss. 14 and 23 of the Workmen's Compensation Act, 1925. The making of an agreement to pay and receive compensation under the Act is sufficient to debar a workman from any remedy at common law, whether or not he has any knowledge of that alternative remedy. [Counsel also contended that the third finding of Oliver J. was not clear and might apply only to the first or the earlier payments and, alternatively, that he was wrong in arriving at that finding. *Cribb* v. *Kynoch, Ld.* (*No.* 2) (6); *McCafferty* v. *MacAndrews & Co., Ld.* (7); and *Birch* v. *Pease and Partners Ld.* (8) were also cited.]

(1) [1946] A. C. 163.
(2) [1940] 1 K. B. 56.
(3) [1940] 1 K. B. 180.
(4) [1944] K. B. 718.
(5) [1926] 2 K. B. 380.
(6) [1908] 2 K. B. 551.
(7) [1930] A. C. 599.
(8) [1941] 1. K. B. 615.

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Streatfeild K.C. in reply: The real question before the House of Lords in *Young's* case (1) was: what is the principle on which a workman can be said to have exercised his option under the subsection? "The enunciation of the reason or "principle upon which the question before the court has "really been determined" (see Halsbury's Laws of England, Vol. 19, p. 251, par. 556) was that declared by the majority of the Law Lords that the workman's claim is not barred by the acceptance of compensation, known to be such, if the recipient was ignorant of the option conferred on him by the subsection.

Cur. adv. vult.

June 25. SOMERVELL L.J. delivered the written judgment of the court. The only issue with which this court is concerned is whether the plaintiff's claim was barred under s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, by reason of the plaintiff's claiming and accepting payments of compensation under that Act. The relevant facts as set out by the House of Lords in *Young* v. *Bristol Aeroplane Co., Ld.* (1) can be shortly stated. (1.) The accident occurred on April 3, 1942. (2.) The workman received weekly payments from April 30 to October 2, 1942, when he returned to work, knowing them to be made as compensation under the Act. (3.) When he began to receive the payments he did not know that he had an option under s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, to exercise an alternative remedy. (4.) In or about July, 1942, he became aware of this right. On the law as previously laid down the fact set out in para. (2.) was fatal to his claim. All the noble Lords agreed that on the facts as set out above the claim was barred. There is, however, a difference of opinion on the construction of the section. Mr. Fenwick invited the court to regard the views expressed by the majority, Viscount Simon, Lord Russell and Lord Porter, as obiter, leaving it open to him to argue that the law had not been altered, as it undoubtedly had been if the opinions expressed by the majority are to be taken as the decision of the House. In the opinion of the majority the plaintiff lost his rights only by the acceptance of the payments after July when he knew of the choice given him by the subsection. The minority, Lord Macmillan and Lord Simonds, held that the acceptance of the payments, knowing them to be compensation under the Act, barred the claim, irrespective of the plaintiff's knowledge of his option. No doubt an appellate court if all the members are of opinion that the appeal fails on one or other of two grounds, may refrain from deciding as between those grounds. In the present case the House of Lords, in our view, clearly did not take this course. Each opinion deals fully with the question of principle. Viscount Simon said (1): "The present "appeal, therefore, is in substance a submission that the "decisions in *Perkins*' case (2) and *Selwood's* case (3) are "wrong, or at any rate that they are not conclusive against the "appellant's claim. The question involves the interpretation "and application of s. 29, sub-s. 1, of the Workmen's Com"pensation Act—a section which is in the same form as s. 1, "sub-s. 2, (*b*) of the original Act of 1897 and one which has "given rise to many difficulties and to a multitude of "decisions." Lord Russell states the question in issue in the following words (4): "The question is whether the appellant "workman having accepted from his employers (the respon"dents), payments of compensation under the Workmen's "Compensation Act, 1925, knowing them to be payments "under that Act, is debarred by reason of s. 29, sub-s. 1, of "that Act from taking proceedings independently of that "Act for the recovery of damages from his employers." Lord Porter, in his review of the authorities, states (5): "In "so far as *Perkins* v. *Hugh Stevenson & Sons, Ld.* (2) and "*Selwood* v. *Townley Coal & Fireclay Co., Ld.* (3) depart "from these principles and decide that the mere acceptance "of compensation as such, but in ignorance of the existence "of an alternative remedy, is a fatal bar to a claim for damages, "I think they are wrong." Other passages could be cited, but these are sufficient.

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(1) [1946] A. C. 163.

In our opinion, therefore, the majority laid down a principle, and, whatever the technical position, we think that this court should give effect to that principle. It involves overruling *Selwood's* case (3) and this is expressly stated by Viscount Simon and Lord Porter. It prevents a claim being barred by acceptance of payments, whether claimed or not, known to be compensation under the Act, if the recipient was ignorant of the option conferred on him by sub-s. 1 of s. 29. The relevant authorities are fully dealt with in the opinions referred to and

(1) [1946] A. C. 169.
(2) [1940] 1 K. B. 56.
(3) [1940] 1 K. B. 180.
(4) [1946] A. C. 173.
(5) [1946] A. C. 186.

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it seems to us unnecessary to refer to them further in this judgment. [His Lordship stated that there was no reason to think that the third finding of Oliver J. was not clear and might apply only to the first or earlier payments or that the judge was wrong in arriving at that finding. He continued :] In the result, in our opinion the appeal must be allowed. The learned judge found the defendants liable if the claim was not barred and assessed the damages at 806*l*. 17*s*. 8*d*. There must, therefore, be judgment for the plaintiff for 806*l*. 17*s*. 8*d*.

Appeal allowed.

Solicitor for plaintiff : *W. H. Thompson.*

Solicitors for defendants : *Carpenters, for Willey Hargrave & Co., Leeds.*

C. G. M.

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Lord Greene, M.R., Morton and Tucker L.JJ.

KENT TRUST LIMITED *v.* COHEN.

Moneylenders—Memorandum of contract—Collateral security—Post dated cheques for payment of principal and interest—Cheques given for interest not referred to in memorandum—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-s.* 2.

On September 15, 1944, the plaintiffs who were moneylenders lent the defendants 1,000*l*. at ninety per cent. interest, repayable by five consecutive instalments commencing on the sixth week. The defendants gave the plaintiffs a promissory note and by way of collateral security five cheques of 200*l*. each in respect of the principal and a cheque of 150*l*. in respect of the interest. A memorandum of the contract correctly set out the terms of the loans and referred to the five cheques of 200*l*. each but omitted any reference to the sixth cheque of 150*l*.

Held (reversing Cassels J.'s decision) that the omission of any reference to the sixth cheque caused the memorandum not to be a memorandum complying with s. 6, sub-s. 2, of the Moneylenders Act, 1927, and the claim to recover the amount due was unenforceable.

Statement of Farwell J. in *In re a Debtor* [1938] 2 All E. R. 759, 763 discussed and explained.

APPEAL from Cassels J. (1).

On September 15, 1944, the plaintiffs, Kent Trust Ld., who were moneylenders, made a loan of 1,000*l.* to the defendants, Andre Cohen and Andre Products, Ld., at 90 per cent. per annum interest, repayable by five consecutive weekly instalments commencing on the sixth week. The defendants gave the plaintiffs a promissory note and by way of collateral security five cheques for 200*l.* each, dated at weekly intervals from October 15, 1944, in respect of the principal of the loan and a sixth cheque for 150*l.* in respect of interest. A memorandum of the contract (set out in the judgment) was duly made setting out the terms of the loan, referring to the five cheques for 200*l.* each, but omitting any reference to the sixth cheque for 150*l.*

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(1) [1946] W. N. 144.

The defendants having paid various sums in respect of principal and interest amounting to 530*l.*, the plaintiffs took proceedings under Or. 14 to recover the balance, the defendants having made default. The defendants obtained leave to defend the action on the grounds that the memorandum did not show the true conditions as to repayment of the loan and that the rate of interest was harsh and unconscionable and should be reduced. Cassels J. said that it has been agreed that the rate of interest, if payable, should be reduced to 48 per cent. per annum. In his view the terms of the loan were fully set out in the memorandum and mention made of the five cheques given as security for the repayment of the principal. It followed that the opening words of s. 6, sub-s. 2, of the Moneylenders Act, 1927, were complied with. The failure to mention the sixth cheque did not entitle the defendants to retain the money borrowed.

The defendants appealed and the additional point was taken that the cheque for 150*l.* was in excess of the interest payable.

Quass for the defendants.
Vester for the plaintiffs.

TUCKER L.J., who delivered the first judgment, said: The defence which was set up was that the plaintiffs were disentitled to recover on the ground that the memorandum which had been entered into between the borrowers and the moneylenders was unenforceable by reason of non-compliance with s. 6 of the Moneylenders Act, 1927. That section provides by sub-s. 1: "No contract for the repayment by a borrower "of money lent to him or to any agent on his behalf by a "moneylender after the commencement of this Act or for the "payment by him of interest on money so lent and no security

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"given by the borrower or by any such agent as aforesaid in "respect of any such contract shall be enforceable, unless "a note or memorandum in writing of the contract be made "and signed personally by the borrower, and unless a copy "thereof be delivered or sent to the borrower within seven days "of the making of the contract; and no such contract or "security shall be enforceable if it is proved that the note or "memorandum aforesaid was not signed by the borrower "before the money was lent or before the security was given "as the case may be." Sub-section 2 says: "The note or "memorandum aforesaid shall contain all the terms of the "contract, and in particular shall show the date on which the "loan is made, the amount of the principal of the loan, and, "either the interest charged on the loan expressed in terms of "a rate per cent. per annum, or the rate per cent. per annum "represented by the interest charged as calculated in accord-"ance with the provisions of the First Schedule to this Act."

The memorandum which was entered into in this case is in these terms: "We agree to borrow from you on the 15th day "of September, 1944, the sum of 1,000*l.* with interest thereon "at the rate of 90*l.* per cent. per annum and upon the terms "of a promissory note to be as follows:—1,000*l.* We "jointly and severally promise to pay Kent Trust Limited or "order at 29, Duke Street, Piccadilly, S.W.1, the sum of "One Thousand Pounds value received with interest thereon "at the rate of 90*l.* per cent. per annum by five consecutive "weekly instalments of 200*l.* each, commencing on the sixth "week. In the event of default being made in payment of "any instalment or part thereof then Kent Trust Limited are "to be at liberty at their option to demand payment of the "whole of the balance of 1,000*l.* principal remaining unpaid "and interest at the rate aforesaid to the date of such demand "and thereupon the whole of the said balance with interest as "aforesaid (whether for principal or interest) shall bear simple "interest on that sum at the rate of 90*l.* per cent. per annum "from the date of such demand until payment and until such "demand any overdue instalment (whether for principal or "interest) shall bear interest at the rate aforesaid from the "due date until payment. As collateral security of the above "Promissory Note we are depositing with you five weekly "post-dated cheques for 200*l.* each, commencing on the "15th October, 1944, drawn by Andre (Manufacture) & Co., Ld., "signed by C. Andre for and on behalf of Andre (Manufacture) &

" Co., Ld., payable to Kent Trust Limited, payable at Credit " Lyonnais, 25-27, Charles II. Street, Haymarket, S.W.1, " which you are at liberty to present and credit our account " with any moneys received by you in respect thereof." That is signed: " Andre Cohen for and on behalf of Andre " Products, Ltd." [The memorandum went on to state a further collateral security deposited and the whole was duly signed.] At the same time a promissory note was also signed by Mr. Andre Cohen on behalf of the Company in the same terms as those set out in the memorandum which I have just read and which I need not repeat.

When the case was tried before Cassels J. under Or. 14 Mr. Koski, the managing director of the plaintiff company, gave evidence on behalf of the plaintiffs. That evidence showed, as the learned judge in fact found in his judgment, that the agreement between the parties was that, in addition to the promissory note which was executed and handed over, post-dated cheques should be given as security consisting of five cheques for 200*l.* each and a sixth cheque for 150*l.*, which was to be security for the payment of interest. With regard to that, the learned judge says in terms : " What the defendant " company offered by way of collateral security was five cheques " of 200*l.* each dated at weekly dates in the future and then " a final cheque, it being the sixth, which was to be 150*l.* for " the use of the money. Five cheques at 200*l.* each equals " 1,000*l.*, that being the principal. So far as the 150*l.* was " concerned, Mr. Koski took that as collateral security also " against the interest, and I accept what Mr. Koski has said, " that he agreed with Mr. Cohen that if the sum worked out " on calculation of interest at 90 per cent. to more than the " interest which was due, he, Mr. Koski would give him back " the difference." That, in effect, is merely setting out the consequences in law of receiving that 150*l.* by way of collateral security. Notwithstanding having found that that was the bargain, the learned judge later in his judgment said this : " The terms of the loan in this case were very fully set out in " the memorandum. The loan which was borrowed was " 1,000*l.* It was not contended that 1,000*l.* did not pass. " It was not one of those transactions where the borrower " acknowledges that he has borrowed 1,000*l.* in order to put " his hands on 750*l.* The interest was clearly set out as " 90 per cent. per annum and in this memorandum referred " to as collateral security. The cheques themselves have been

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" set out—the cheques which were the collateral security to " secure the loan ; they were in fact five cheques of 200*l*. " each." Then, in dealing with the submission made to him on behalf of the defendants that this memorandum was deficient and failed to comply with s. 6 of the Act by reason of the fact that it contained no mention of the sixth cheque for 150*l*. which had been given by way of security for the payment of the interest—and after referring to some authorities which had been cited to him—the learned judge said : " The " cases, of course, are very useful as a guide to the way in " which this Act is to be administered, but I cannot help " thinking that each case must depend upon its own circum- " stances. Nobody knew better than Mr. Andre Cohen that " he had given that cheque for 150*l*. to be a further collateral " security. No one knew better than he that he had given " six cheques altogether, five for 200*l*. each, which would make " up 1,000*l*., and one for 150*l*. to be available to the money- " lender for interest. I am quite satisfied that the arrange- " ment between them was not that the moneylender should " put the whole of the 150*l*. for interest into his pocket if the " terms of the contract had been complied with and the money " paid back upon the due date, but that a calculation would " have been made at 90 per cent. interest on the terms of " the promissory note and that any balance would have been " repayable to Mr. Andre Cohen."

The learned judge, therefore, came to the conclusion that in his view there had been a sufficient memorandum to comply with the requirements of the statute. I think that in so doing he was founding himself upon a sentence in the judgment of Farwell J. in *In re a Debtor* (1) dealing with the authorities and the effect of the authorities that had been cited to him : " If the memorandum does not disclose the true terms, so " that the debtor is prejudiced, or so that his position is not " so good as it appears to be, then the memorandum may not " comply with the section. On the other hand, if the error " is one which can be easily seen to be an obvious error, and " which can be easily understood to be an error, so that the " debtor will appreciate what the true position is, or that it " is so trivial that it does not affect the position at all, the " error will not be sufficient to affect the memorandum." I think Cassels J., in coming to his decision, was probably founding himself upon that statement and while regarding

(1) [1938] 2 All E. R. 759, 763.

the omission of the cheque for 150*l*. as an error, took the view that, provided the borrower had not, in fact, been prejudiced, he could no longer rely upon an insufficient memorandum. In my view, that is not the effect of what Farwell J. was saying, nor do I think that the omission of all reference to the cheque for 150*l*. in this case can possibly be regarded as an error, or, at any rate, the kind of error that Farwell J. had in mind in reviewing the authorities which had been cited to him. Nor is there, in my view, any evidence that the omission to refer to this 150*l*. was, in fact, due to any mistake on the part of Mr. Koski at all. There is some evidence that the transaction was carried through with some degree of haste, but all the evidence, in my view, is quite consistent with Mr. Koski having deliberately omitted to mention in the memorandum this cheque for 150*l*.

It is not disputed—and the authorities which have been referred to make it clear—that, in order to comply with the section, where security is given the memorandum must set out with accuracy what the security is. I do not think it is necessary to refer further to the authorities on that point. In my view, in this case the memorandum was clearly defective in that it omitted any mention at all of this cheque for 150*l*.

It has been contended by Mr. Vester, on behalf of the plaintiffs, that this section should be construed differently according to the degree of education and intelligence possessed by the borrower. In my view, that is quite an impossible approach to the interpretation of this, or, I would add, any, Act of Parliament. I think on the clear interpretation of this particular section it was necessary that this cheque, which formed an essential part of the security, should be referred to. Finally Mr. Vester adumbrated that the judgment of the learned judge might possibly be supported in some way on the ground of fraud on the part of the borrower. As has been pointed out by my Lord, there are at any rate two answers to that: first, that no such fraud was pleaded, and, secondly, that there was no evidence of any such fraud.

For these reasons, in my view, this appeal succeeds.

MORTON L.J.: I agree, and I shall only add a few words because I was a party to the decision in *In re a Debtor* (1). Cassels J. appears to have taken the view that s. 6 of the Moneylenders Act, 1927, need not be strictly complied with, if the borrower in fact knows what are the terms of the contract.

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(1) [1938] 2 All E. R. 759.

He says, in a passage which has already been read, "Nobody "knew better than Mr. Andre Cohen that he had given that "cheque for 150*l.* to be a further collateral security." In the case of *In re a Debtor* (1) Farwell J. pointed out very clearly that that was no answer to a defence based upon the section. In that case the defect in the memorandum was that, whereas the debtor had given two promissory notes for 50*l.* each, the memorandum referred to "*a* promissory note "for 100*l.*" Farwell J. said this: "There is no doubt that "the person who signed the memorandum was perfectly well "aware that there were two promissory notes. It has not "been suggested that he was not. None the less, the "memorandum does not state the whole effect of the contract, "because it states that the loan is secured by a promissory "note, and there are in fact two promissory notes." He then went on to point out how the position of the debtor might be worse because of the fact that two promissory notes were given. The statute lays down that the note or memorandum shall contain all the terms of the contract, and, in my view, it is no answer to say that the borrower knew exactly what the terms of the contract were. I agree that the appeal must be allowed.

Lord Greene M.R.: I entirely agree. I wish to state, in fairness to Mr. Koski, my understanding of one phrase which my brother Tucker used—and I am quite certain that he used it in the sense that I am going to mention—namely, that the evidence was consistent with Mr. Koski having "deliberately" left out any reference to this sixth cheque. I understand that as meaning—at any rate, this would be my own view—that it was certainly consistent with it having been done deliberately but without any implication of fraud or dishonesty on Mr. Koski's part, that it was consistent with his having left it out because he did not think it necessary to refer to it. I hope I am interpreting my brother Tucker's meaning when I say that I did not take his suggestion that it was done "deliberately" as implying anything dishonest.

Tucker L.J.: My Lord has quite correctly interpreted what I intended to imply.

Appeal allowed.

Solicitors: *Stone & Stone; Isadore Goldman & Co.*

H. C. G.

(1) [1938] 2 All E. R. 759.

Distinguished. AMPHLETT *v.* DORRELL. [1948] 2 All E.R. 674.

Applied. CAPITAL & PROVINCIAL PROPERTY TRUST, LTD. *v.* RICE. [1950] 2 All E.R. 174.

Distinguished. AMPHLETT *v.* DORRELL. [1949] 1 K. B. 276

Followed. LINDOP *v.* QUAIFE. [1949] 1 All E.R. 456.

UPSONS, LIMITED *v.* HERNE.

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June 27, 28; *July* 16.

Morton, Somervell and Asquith L.JJ.

Landlord and Tenant—Rent restrictions—Flat—Standard rent—Apportionment of rent charged for flat with another flat and shop—Whether both containing and contained premises must be within the Rent Restrictions Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 *and* 3.

Where a building consisting of two flats and a shop, each completely separated from the others with a separate entrance, was let in 1911 for a term of twenty-one years at a rent of 150*l.* per annum, the standard rent as defined in s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, of one of the flats afterwards let separately, must be ascertained by apportioning the rent of 150*l.* under s. 12, sub-s. 3.

The apportionment directed by s. 12, sub-s. 3, applies whether a building let at a single rent contains a number of dwellings completely separated from each other or a number of dwellings with common staircases and passages.

The dictum of Scott L.J. in *Field* v. *Gover* [1944] K. B. 200, 206, suggesting that s. 12, sub-s. 3, only applies if both the containing building and the contained dwellings were within the Rent Restrictions Acts does not accord with the law as laid down in *Barrett* v. *Hardy Brothers* (*Alnwick*), *Ld.* [1925] 2 K. B. 220, which must be treated as binding.

APPEAL from Barnet county court.

By an agreement in writing, dated April 4, 1938, the plaintiffs, Upsons, Ld., let to the defendant, Henry Herne, a flat known as 2A Golders Way, Golders Green, for one year commencing on April 11, 1938, and thereafter from year to year at the annual rent of 78*l.* The rateable value of the flat was 33*l.* and the Rent Restrictions Acts applied. This agreement contained a proviso for re-entry without giving any notice to quit if the rent should be in arrears for twenty-one days or upwards. The defendant having fallen into arrears with the rent the plaintiffs took proceedings for recovery of possession and arrears of rent but an order in their favour was set aside by the Court of Appeal and a new trial ordered with fresh particulars of claim and defence before a different judge. The new trial came on on January 15, 1946, but was adjourned till February 26, 1946, owing to the plaintiffs' failure through a mistake to attend. The plaintiffs claimed to recover possession and 289*l.* 19*s.* 6*d.* arrears of rent down to October 14, 1945. The defendant denied that he was indebted to the plaintiffs and relied on the Rent Restrictions Acts contending that the standard rent of the

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flat did not exceed 45*l*. per annum exclusive of rates. Alternatively, the defendant set up an alleged arrangement made on April 13, 1942, varying the terms of his tenancy but this contention failed.

There was evidence that the entire premises consisting of Flats 2A and 2B with a shop underneath them were let to one Woolf Klein in September, 1911, for a term of twenty-one years at a rent of 150*l*. per annum, that the two flats and the shop were completely separated from each other with separate entrances and that in 1925 the plaintiffs having become possessed of the premises let flat 2A to one Curry at the rent of 100*l*. per annum.

The county court judge made an order for possession and 234*l*. arrears of rent with a direction that the order should be suspended so long as the defendant paid the rent of 6*l*. 10*s*. a month and an extra 10*s*. a month in payment of arrears. In his note giving his reasons for his decision the county court judge said: "The above judgment was based on a finding that "flat 2A was first let separately in 1925 at a rent of 100*l*. "per annum and that 100*l*. was therefore, the standard rent. "It appears, however, in the evidence that the whole building "comprising flats 2A and 2B and a shop had been let for a term "of twenty-one years from September 19, 1911, at 150*l*. per "annum. My attention was not called to *Sutton* v. *Begley* (1) "and I overlooked the question of apportionment." The defendant appealed and the grounds of his appeal are set out in Morton L.J.'s judgment.

The defendant appeared in person.
Raymond Waters for the plaintiffs.

Cur. adv. vult.

July 16. The following judgments were read.

Morton L.J. The appellant in this case was the defendant in the county court, and I shall find it convenient to refer to him as the defendant. He conducted his appeal in person and made it very obvious from the start that he considers himself a man with a serious grievance. He sought to advance his cause by making serious allegations against the fairness of two county court judges, against the truthfulness of counsel for the plaintiffs on this appeal (who has conducted his case with admirable good nature, marked ability and complete fairness), and against the honesty of the solicitors for the plaintiffs and of the property manager who gave evidence on behalf of the plaintiffs. [His Lordship stated the facts and continued :] The defendant puts forward four arguments in support of his appeal : (1.) That the agreement to pay 78*l*. a year rent was varied by an agreement between the plaintiffs and himself made in 1942. It is plain from the notes and order of the county court judge that he found against the defendant on this issue of fact, and there is no ground on which that finding can be disturbed, as there was clearly material on which he could so find. (2.) That prior to August 3, 1914, Flat 2A had been let separately at a rent of 35*l*. a year to a sub-tenant of one Woolf Klein, and this sub-tenancy was still subsisting on August 3, 1914. If this were so, the standard rent would be 35*l*., under s. 12, sub-s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that : " The expression " ' standard rent ' means the rent at which the dwelling-house " was let on the third day of August 1914, or, where the dwelling-" house was not let on that date, the rent at which it was last " let before that date, or, in the case of a dwelling-house which " was first let after the said third day of August, the rent at " which it was first let." However, the defendant failed to prove the facts on which he sought to rely, and the judge held that " Flat 2A was first let separately in 1925 at a rent of 100*l*. " a year." There was evidence to support that finding of fact, the lessee in 1925 being one Curry, and it is, of course, fatal to the defendant's second point. (3.) That the case came within s. 6 of the Amendment Act of 1933, and, accordingly, the standard rent should be 45*l*., having regard to the standard rent of similar dwelling-houses in the neighbourhood. In view of the judge's finding, it is plain that this section does not apply to the present case. (4.) That from 1911 till a date after 1914, flats 2A and 2B, together with a shop No. 12, Golders Green Road, were included in one lease to Woolf Klein at a single rent of 150*l*. Accordingly, flat 2A was " let " to Woolf Klein on August 3, 1914, and in order to ascertain its standard rent it is necessary to apportion the rent of 150*l*. between the three premises comprised in the lease of 1911, this apportionment being carried out under s. 12, sub-s. 3, of the Act of 1920. This argument was first suggested by the note of a county court judge whom the defendant has accused of unfairness. The lease to Woolf Klein is admitted, and it was agreed at the hearing

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(1) [1923] 2 K. B. 694.

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of this appeal that the three premises, flat 2A, flat 2B, and the shop, have at all times been wholly separate, except that one roof covers them. That roof also covers a number of other flats and shops, as the three premises in question form part of a terrace consisting of shops on the ground floor and flats above. Flats 2A and 2B are partly, but not wholly, above the shop, No. 12. They are not internally connected in any way with the shop or with one another and each of the flats has a separate entrance of its own.

Thus a question of law arises: Was flat 2A "let" within the meaning of s. 12, sub-s. 1, of the Act of 1920 by reason of the fact that it was included in the lease to Woolf Klein? If so, a case for apportionment arises; if not, flat 2A was "first "let" when it was let separately to Curry in 1925 and the standard rent is 100*l*., so that the defendant still remains bound to pay his agreed rent of 78*l*. a year. In my view, the question which I have just stated must be answered in the affirmative.

Mr. Waters contended on behalf of the plaintiffs that there was no "letting" of flat 2A till 1925, and he sought to distinguish *Sutton* v. *Begley* (1) on the ground that the flat in question in the present case has always been a separate dwelling. I agree that the present case differs in that respect from *Sutton* v. *Begley* (1), but in my judgment the only result of that difference is that whereas *Sutton* v. *Begley* (1) was a difficult case, this present case comes directly within the wording of s. 12, sub-s. 1, of the Act of 1920. This separate dwelling flat 2A was let to Woolf Klein in 1911 and it was still let to him on August 3, 1914. True, two other premises were included in the letting and the three were let in one lease at one rent instead of in three separate leases at three separate rents, but I cannot see how that prevents flat 2A from being "let" within the meaning of the Act of 1920. Presumably, the three premises were let at a rent which was thought by lessor and lessee to be the fair aggregate annual rental for the three; but, whether this is so or not, I see no escape from the view that if three properties A, B and C are let by X to Y under one and the same lease, then each one of them is let by X to Y. This being so, in my view the present case comes within s. 12, sub-s. 3, of the Act of 1920, which provides that: "Where, for "the purpose of determining the standard rent or rateable value "of any dwelling-house to which this Act applies, it is necessary "to apportion the rent at the date in relation to which the

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" standard rent is to be fixed, or the rateable value of the " property in which that dwelling-house is comprised, the " county court may, on application by either party, make such " apportionment as seems just, and the decision of the court as " to the amount to be apportioned to the dwelling-house shall " be final and conclusive."

This appeal must be allowed, for these reasons, and, unless the parties can agree on an order here and now, the case must be remitted to the county court judge to make an apportionment, and to make such order as may be just on the basis of such apportionment. It may be that the payments of rent already made by the defendant will be found to equal or exceed the apportioned rent. If so, the action must be dismissed; if not, the judge will have power to make an order for possession under s. 3, sub-s. 1, of the Act of 1933 and para. (*a*) of the First Schedule to that Act, if he considers it reasonable to make such an order. If the matter is remitted to the county court judge, the costs of the previous hearing before him, and of the further hearing before him, will be in his discretion. The plaintiff will pay the costs of this appeal.

SOMERVELL L.J. I agree with the view of Morton L.J., that it is, at any rate, difficult to regard a dwelling-house as not let in 1914 because its occupier took a lease which included, for example, the house next door. One has, however, to read the definition of standard rent with the apportionment section, and, unless the case of separate premises, such as those in question here, comes within that section, the defendant must fail. I agree with the conclusion to which my brother Morton has come, but I would like to deal in a little detail with s. 12, sub-s. 3, of the Act of 1920. It is, I think, somewhat loosely worded. It deals with rent and rateable value. There are express words dealing with the date in relation to which the standard rent is to be fixed, but no such words occur in reference to rateable value, though that may equally have to be determined as on a particular date. The corresponding provision in that case is left to be implied. The words " of the " property in which that dwelling-house is comprised " follow rateable value, and the comma, which is not technically part of the statute, might suggest that these words only apply to rateable value. On the other hand, if so read, the words " the " rent " are, as it seems to me, left in the air. I think, therefore that one must either read the words " of the property in which "that dwelling-house is comprised" as applying to "the rent," disregarding the comma, or imply them. The cases which have come before the High Court seem all to have been cases of rooms or flats out of a larger building with some common means of communication with other parts. In the case of *Barrett* v. *Hardy Brothers* (*Alnwick*), *Ld.* (1), though the building was a large one and included a restaurant, a shop, business offices, and residential flats, it was referred to as a single building, No. 61 Pall Mall, and it seems obvious that the second and upper floors with which the case was concerned must have had a staircase or staircases and passages used in common by the different occupiers. Do the words "the property in which that "dwelling-house is comprised" predicate some unit in the physical sense, or do they mean the property the rent of which includes or comprises that apportionable to the dwelling-house? I think in some contexts the former might be the proper meaning to give to them, but I am satisfied that in their context, namely, in an apportionment section, the latter is the proper meaning.

I have referred above to *Barrett's* case (1). That case proceeded on the view that s. 12, sub-s. 3, may apply although the larger property, the rent of which is to be apportioned, is itself outside the Acts and contains premises other than "dwelling-houses." Our attention was drawn to a dictum by Scott L.J. in *Field* v. *Gover* (2), in which he was inclined to the view that s. 12, sub-s. 3, of the 1930 Act only applied if both houses, the containing and the contained, were within the Acts. It does not appear that Scott L.J.'s attention was drawn to *Barrett's* case (1) and the authorities there referred to, and I do not, speaking for myself, think that the dictum should be regarded as throwing doubt on the law as laid down in *Barrett's* case (1). It is worth noting that s. 12, sub-s. 3, of the Act of 1920 has remained unamended during the twenty-one years that have elapsed since it was construed in the way I have stated.

I do not disagree with any of the reasoning in Morton L.J.'s judgment, but I wished to add, as I have done, some observations on the construction of s. 12, sub-s. 3, as it seems to me it is on the wording of that section that the basis, if any, of Mr. Waters's contention must rest.

ASQUITH L.J. For a time I have shared the doubts expressed by Somervell L.J. as to the possibility of apportionment in this

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(1) [1925] 2 K. B. 220.

(2) [1944] K. B. 200, 206.

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case having regard to the wording of s. 12, sub-s. 3, of the Act of 1920, mainly because the words "the property in which "that dwelling-house is comprized" seem, at first sight, to imply a single physically self-contained unit (which would include flat 2A) and not a mere aggregate of three separate tenements unconnected with each other, save that they were covered by the same lease and let at a single rent; but, like my brother, I have been converted from that view and I agree that the appeal should be allowed.

MORTON L.J. I should like to add this, that I agree with the observations made by Somervell L.J. in regard to the true construction of s. 12, sub-s. 3, of the Act of 1920, and in regard to the case of *Field* v. *Gover* (1).

Appeal allowed.

Solicitor for the plaintiffs: *William Charles Crocker.*

H. C. G.

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(1) [1944] K. B. 200, 206.

BROWNING *v.* FLOYD.

1946
May 8.
Lord Goddard C.J., Humphreys and Singleton JJ.

Railways—Unused half of return-ticket—Transfer by wife to husband—Use by husband—Absence of intent to defraud—Regulation of Railways Act, 1889 (52 & 53 *Vict., c.* 57), *s.* 5, *sub-s.* (3).

A wife, not having had occasion to use the outward half of a railway return ticket which she had bought for a journey from London to a country station, handed it to her husband. The husband, when subsequently travelling from the country station to London, himself bought a return ticket, but used for the return journey from London to the country the unused half of his wife's ticket. There was no intention on the part of either to defraud the railway company:—

Held, that the husband was guilty of contravening s. 5, sub-s. (3), of the Regulation of Railways Act, 1889, and his wife of aiding and abetting him, and that both were guilty of an offence against by-law No. 6 of the Southern Railway Co.'s by-laws, intent to defraud not being a necessary ingredient of any of those offences.

CASE STATED by Kent justices.

At a court of summary jurisdiction sitting at Tonbridge informations were preferred by the appellant, Arthur William

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Browning, a detective of the Southern Railway Company against the respondents Arthur Donald Floyd and Doris Elizabeth Floyd his wife, alleging that Floyd, on August 16, 1945, at Tonbridge (1) unlawfully travelled on the Southern Railway without having previously paid his fare and with intent to avoid payment of it, contrary to s. 5, sub-s. (3) (*a*) of the Regulation of Railways Act, 1889 (1); and (2.) unlawfully, knowingly and wilfully used a partly-used non-transferable passenger ticket for the purpose of travelling on the railway at Tonbridge, contrary to by-law No. 6 of the Southern Railway Company (2); that his wife (1.) on the same date and at the same place unlawfully aided, abetted, counselled and procured Floyd to travel on the railway with intent to avoid payment of the fare, contrary to s. 5 of the Summary Jurisdiction Act, 1848 (1); and (2.) between August 10 and 16, 1945, unlawfully transferred a partly-used non-transferable ticket to Floyd with intent that he should use it to travel on the railway, contrary to by-law No. 6 of the company.

At the hearing of the informations, the following facts were proved or admitted: On August 10, 1945, the wife, or some person, other than her husband, acting as her agent, bought from the railway company or their agents a third-class monthly return ticket dated August 10, 1945, from London Bridge

(1) By s. 5, sub-s. 3, of the Regulation of Railways Act, 1889, "If any person—(*a*) travels or "attempts to travel on a railway "without having previously paid "his fare, and with intent to "avoid payment thereof . . . . . "he shall be liable to a fine . . . ."

By s. 5 of the Summary Jurisdiction Act, 1848, " . . . . every per-"son who shall aid, abet, counsel, "or procure the commission of any "offence which is or hereafter shall "be punishable on summary "conviction shall be liable to be "proceeded against and convicted "for the same . . . ."

(2) By by-law 6 of the by-laws and regulations of the Southern Ry. Co. made under the Railway Clauses (Consolidation) Act, 1845, "No person shall sell "or buy or attempt to sell or buy "any ticket (which expression in "this by-law includes any "passenger ticket . . . .) or trans-"fer or receive any partly used "ticket or any season ticket to or "from any other person with "intent that any person shall use "the same for the purpose of "travelling or conveyance upon "the railway, unless the ticket "shall at the time of issuing "thereof purport to be trans-"ferable, and no person shall "knowingly and wilfully use or "attempt to use any ticket which "has been sold, bought, trans-"ferred or received in contra-"vention of this by-law . . . ."

By by-law No. 1, any person offending against, inter alia, by-law No. 6 shall be liable to a specified penalty.

to Paddock Wood, for which she paid to the company 7*s.* 5*d.* The ticket was stated on its face to be not transferable.

At the time of the purchase she intended to use the ticket herself for travelling from London Bridge to Paddock Wood and back; but she did not use the forward half of the ticket as she travelled to Paddock Wood by road. On a day between August 10 and 16, 1945, she travelled from Paddock Wood to London Bridge, using the return half of the ticket, and transferred the forward half to her husband with the intention that he should use it for travelling from London to Paddock Wood. On August 16, the husband travelled by railway from London to Paddock Wood, and when, in the course of his journey, he was asked by a ticket inspector to produce his ticket, he showed the forward half of the ticket which had been transferred to him by his wife.

On some date unknown but before August 16, 1945, the husband had bought at Paddock Wood for his own use a monthly return ticket to London. The return half of that ticket would have been available for his journey from London to Paddock Wood on August 16, but he did not produce it to the ticket inspector, and he had no intention of using it for that journey, his evidence before the justices being that he did not produce it because he was so certain that he was right in using the forward half of the ticket which had been transferred to him by his wife.

The husband lived and worked at Paddock Wood, and his wife lived and worked in London. They met at week-ends, he going to London or she to Paddock Wood. When she travelled to Paddock Wood he refunded to her the money which she had paid to the railway company for her ticket.

It was contended for the appellant (i.) that the facts proved (*a*) that the husband on August 16 travelled on the Southern Railway without having previously paid his fare and with the intention of avoiding payment of it within the meaning of the Act of 1889; and (*b*) that he knowingly and wilfully used a partly-used ticket which had been transferred in contravention of by-law No. 6, and was thereby guilty of the two offences charged; (ii.) that the fact that he possessed a valid ticket was no defence to either of the charges, inasmuch as he admitted that it was his intention to use the forward half of the ticket which had been transferred to him by his wife instead of the return half of the ticket which he alleged that he had bought, which was available for use within one month

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from the date of issue, and which he intended to use on some future occasion within the period of its availability; (iii.) that the facts proved that the wife transferred a partly-used ticket to her husband with the intention that he should use it for travelling from London to Paddock Wood, and that she was thereby guilty of (*a*) aiding, abetting, counselling or procuring her husband to commit the offence under the Act, and (*b*) transferring the ticket in contravention of by-law No. 6.

It was contended for the husband and wife that the husband had not travelled with the intention of avoiding payment of his fare as he was in possession of two tickets which had been paid for with his money, and that in this instance husband and wife must be treated as one person, so that there was no contravention of the by-law.

The justices, being of opinion that there was no intent to defraud or contravention of the statutes or by-laws, dismissed the informations. The railway detective appealed.

Gattie for the appellant. On the facts which they found the justices were bound to find both husband and wife guilty of the offences charged. They allowed themselves to be led astray by the fact that neither husband nor wife had any intention to defraud the railway company. Intent to defraud is not, however, an ingredient of the offence created by s. 5, sub-s. (3) of the Act of 1889 or by the company's by-law No. 6.

The respondents did not appear and were not represented.

Lord Goddard C.J. A wife, having bought a return ticket from London Bridge to Paddock Wood, only made the return journey by train, for she was taken to Paddock Wood by motor-car. She then did what may be wrong but would, no doubt, be done by any wife in the circumstances: she gave her husband the unused forward half-ticket. He, having that in his possession, bought a monthly return ticket from Paddock Wood to London Bridge and kept the return half to use on some future occasion, using instead, for his return journey to Paddock Wood, the forward half which his wife had not used. Husband and wife were prosecuted, the husband for unlawfully travelling on the railway without having previously paid his fare, with the intention of avoiding payment and the wife with aiding and abetting the offence. That intention appeared from his own evidence, which, perhaps, he was unwise to give, since he need not have given evidence at all. He said that he did not produce the return half of his own ticket because he was so certain that he was right in using the forward half of the ticket which his wife had bought and transferred to him. He intended to make that journey on his wife's ticket without using that which he had bought himself. The offence is proved. Intent to defraud does not matter. The question is whether he intended to avoid paying the fare. Using the ticket bought by his wife was a contravention of the by-law, as also was the wife's transfer of her ticket to him. Again, it does not matter whether or not there was intent to defraud, or whether or not they intended to contravene the by-law or statute. Therefore the case must go back to the justices with an intimation that both offences charged against both respondents are proved, and with an intimation that they can deal with the case under the Probation of Offenders Act, or by imposing any fine they please, from 1*d.* to forty shillings.

HUMPHREYS J. I agree.

SINGLETON J. I agree.

Appeal allowed.

Solicitor for appellant: *H. L. Smedley.*

WESTERN INDIA MATCH COMPANY, LIMITED *v.* LOCK AND OTHERS.

1946
May 27, 31.

Lord Goddard C.J.

Limitation—Public authorities protection—Commercial cargo in requisitioned ship—Loading and unloading by officers of Crown—Execution of public duty or authority—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21, *sub-s.* 1.

The Minister of War Transport requisitioned a steamship under reg. 53 of the Defence (General) Regulations, 1939. While the ship was operating under charter to him, she was loaded at Basra by his representatives with a commercial cargo for Bombay belonging to the plaintiffs. On arrival at Bombay, which port was under the control of the naval authorities, the ship was unloaded under the direction of the Minister's representative there. During that operation the plaintiffs' cargo was lost by fire. The plaintiffs, alleging that the loss was due to negligence in the loading and

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

unloading of the cargo, brought an action, more than a year after the loss, against the Minister's representatives concerned.

Held, that the Minister, by his representatives, was, in the loading and the unloading of the cargo, exercising a public duty and a public authority, inasmuch as he was entitled, in exercise of his powers under reg. 53 of the Regulations of 1939, to direct the carriage in a requisitioned ship of any cargo which he thought expedient in the national interest, and that the action was accordingly barred by virtue of s. 21, sub-s. 1., of the Limitation Act, 1939.

Hartin v. *London County Council* (1929) 141 L. T. 120, criticized.

PRELIMINARY POINT OF LAW tried by LORD GODDARD C.J.

The plaintiffs claimed damages for the loss of a cargo of potassium chlorate which was destroyed by fire in the course of being unloaded at the port of Bombay from the S.S. *City of Barcelona* in 1942. The ship had been requisitioned by the Ministry of War Transport and was operating under charter to the Minister, the form of charterparty being that applicable to requisitioned hired transports and known as T. 99A.

The cargo was loaded at Basra, in the Persian Gulf, where one Lock, whose executrix was the first defendant, was the Minister's representative. The other two defendants were the divisional sea transport officers for Basra and Bombay respectively, and were officers in the Navy. The plaintiffs in their statement of claim alleged that the loss occurred through the defendants' negligence in both the loading and discharge of the cargo. By way of defence the defendants pleaded, inter alia, that the claim was barred by s. 21 of the Limitation Act, 1939 (1), as the writ had been issued more than a year after the cause of action arose. Accordingly an order was made for that defence to be tried as a preliminary point of law under R. S. C. Or. 25, r. 2.

The second and third defendants and the deceased Lock were admittedly representatives or acting as officers of the Minister in relation to ships and cargoes in the Persian Gulf and the port of Bombay. The ship was requisitioned by the Minister under reg. 53 of the Defence Regulations (General), 1939, which authorized the Minister, who was agreed to be

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(1) By s. 21, sub-s. 1, of the Limitation Act, 1939, "No action "shall be brought against any "person for any act done in pur-"suance, or execution, or intended "execution of any Act of Parlia-"ment, or of any public duty or "authority . . . . unless it is com-"menced before the expiration of "one year from the date on which "the cause of action accrued ". . . ."

" a competent authority " within the meaning of that regulation, to requisition ships and to use or deal with them when requisitioned for such purpose and in such manner as he should think expedient in the interests of the successful prosecution of the war and of maintaining essential supplies. The routing of the ship was directed by Lock and by the defendant Wiles as sea transport officer, and they allowed the shipment on board of the cargo in question, for which a bill of lading was signed. Special arrangements were made for the shipment by the *City of Barcelona*, as that class of cargo was only permitted in certain vessels. In addition to that cargo the ship was carrying 144 tons of machinery.

On her arrival at Bombay, the Minister's local agents communicated with the divisional sea transport officer at that port, the third defendant, who gave orders for the berthing and announced that his headquarters would attend to the discharge. It was admitted that the divisional officer was acting on behalf of the Minister, but there was no information before the court as to the position of that officer or under what authority or order he was acting, or whether the local government had taken possession of the docks and, if so, by what authority. It was, however, assumed for the purposes of the decision that a naval authority was acting as harbourmaster.

Sir Hartley Shawcross A.-G. and *H. L. Parker* for the defendants. These defendants were acting in execution of a " public " duty or authority " within the meaning of s. 21, sub-s. 1, of the Limitation Act, 1939. The word " authority " is perhaps more apt than the word " duty " in this case. [*Bradford Corporation* v. *Myers* (1), *Hartin* v. *London County Council* (2), and *Griffiths* v. *Smith* (3) referred to.] The effect of the authorities is not that a defendant, in order to have the protection of the Act, must have been doing an act which he was specifically required by statute to do. It is enough for him to show that what he was doing was in the course of the exercise, for the benefit of the public, of an authority or power which was vested in him. He may be doing something discretionary. If, when an authority have decided to exercise, in the public interest, a power which they have, something is done which is incidental to the exercise of that power and, also, is in the public interest, that is sufficient to bring the person performing the act within

(1) [1916] 1 A. C. 242.
(2) (1929) 141 L. T. 120.
(3) [1941] A. C. 170.

the statutory protection extended to a servant of the Crown.

Quite apart from that, the case of a servant of the Crown is necessarily different from that of a local authority. There is no recorded decision that a servant of the Crown on duty carrying out orders lawfully given to him is not within the protection of the Act. Any officer of the Crown carrying out a lawful order is performing a public duty. [Lord Goddard C.J.—What is the order which was being carried out here ?] The defendants were carrying out the order to load or discharge the cargo in or from a ship chartered by the Crown. Quite apart from any statutory regulations under which the defendants were acting, it was the common law duty of the Crown to do what was necessary to protect its subjects by conducting the war. Here, whether or not under some express statutory power operative in India, the defendants received an order which they were bound to obey. It was the duty of the Crown to make the best possible use of shipping for the prosecution of the war. That included ensuring speedy loading and turn-round. Anything done in pursuance of that duty must be in execution of a public duty, and there is accordingly no necessity for the court to go behind the orders which the defendants were carrying out in order to examine their statutory basis. The orders given to the defendants were prima facie lawful, and it is enough to gain them the protection of the Act of 1939 that they were doing something incidental to the carrying out of those orders.

Willink K.C. and *A. J. Hodgson* for the plaintiffs. This is a difficult case in its relation to the sphere of Government trading. The real point of the case is the position which arises when, acting within his discretion in regard to a requisitioned ship, the Minister of War Transport, or other responsible Minister, decides to use part of the space in the ship for commercial cargo. It is in that aspect that this case is parallel with *Bradford Corporation* v. *Myers* (1). The proposition should not be accepted that the Crown is under a common law duty to requisition ships belonging to private persons in order to protect the subject. If there were such a duty a number of statutory regulations might not have been made during the war which were, however, necessary. The defendants accept the assumption that the Minister was using this ship properly in pursuance of his powers.

It may be the duty of the Minister to do whatever is necessary

(1) [1916] 1 A. C. 242.

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WESTERN INDIA MATCH CO., LD. *v.* LOCK.

in order to put a requisitioned ship to the best possible use. But, in taking on board commercial freight, he is departing from the sphere of what is public, and the discharge of that cargo will be the execution, not of a public duty or authority, but of a private contract. [The speeches of Lord Buckmaster (1) and Lord Shaw (2) in *Bradford Corporation* v. *Myers* and of Lord Simon in *Griffiths* v. *Smith* (3) referred to with regard to the exact nature of a public duty or authority.] There is in this case, as in *Bradford Corporation* v. *Myers* (4), a severance to be made between the general carriage (in this case of war stores) and the carriage of commercial freight. [The *Ronald West* (5) referred to.] There is no ground for the submission that the Crown enjoys a higher degree of protection in this respect than local authorities. The distinction between public and private activity drawn in respect of a local authority in *Bradford Corporation* v. *Myers*(4) is applicable also to the Crown. The Crown here, with this commercial carriage, is wholly comparable with Bradford Corporation and their private trade in coke.

Hodgson following. The argument that the Minister of War Transport, who as a trustee for the nation requisitions a ship, must take steps to see that any waste space in a ship left by his own arrangements is occupied by freight does not mean that the loading of such freight is in exercise of a public duty. It will be prudent on his part to occupy the waste space with private freight, but that lies outside the authority which he is exercising.

Sir Hartley Shawcross A.-G. replied.

Cur. adv. vult.

May 31. LORD GODDARD C.J. read a judgment in which he stated the facts as set out above and continued: The plaintiffs contend that the facts disclose no more than that there was an ordinary commercial adventure, the carrying of a commercial cargo by the Minister as charterer of the ship, for which a bill of lading had been signed. They contend that this gives rise to private commercial obligations and that there is nothing to show that the defendants were acting in pursuance or execution or intended execution of an Act of Parliament or of any public duty or authority or otherwise than as agents for a

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(1) [1916] 1 A. C. 247.

(2) Ibid. 262.

(3) [1941] A. C. 177.

(4) [1916] 1 A. C. 242.

(5) [1937] P. 212.

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charterer. It would have been more satisfactory had I been furnished with some precise information as to the position of sea transport officers and of the conditions prevailing at the port; but no technical points were taken, and the parties evidently desire a decision based on the realities of the position, which, no doubt, were that the navy was in control of the port and, at least as regards requisitioned ships sailing under the orders of the Government, took control of them when they arrived at the port.

It is beyond question that the Crown (and for this purpose the Minister and his officers must be regarded as the Crown) is a public authority, and whether a public authority is protected by the section depends on whether the act complained of arose out of the discharge of a public duty or the exercise of a public authority: see *Bradford Corporation* v. *Myers* (1). I do not find it necessary to quote from the speeches of the noble Lords in that case, because, though Lord Haldane pointed out that it may be difficult to extract from the words of the Act a comprehensive principle which would serve as a guide for the future, in *Griffiths* v. *Smith* (2) Lord Maugham has summarized the effect of that case and those which had preceded it in a passage which, I venture to think, goes far to solve any difficulty. He said (3) "My Lords, since the decision of this House in "*Bradford Corporation* v. *Myers* (1), and the tacit or express "approval of the cases I have referred to, it has been impossible "to doubt (if it was doubtful before) that it is not essential that "a public authority seeking to rely on the Act of 1893 must "show that the particular act or default in question was done or "committed in discharge or attempted discharge of a positive "duty imposed on the public authority. It is sufficient to "establish that the act was in substance done in the course of "exercising for the benefit of the public an authority or a power "conferred on the public authority not being a mere incidental "power, such as a power to carry on a trade. The words in the "section are 'public duty or authority,' and the latter word "must be taken to have its ordinary meaning of legal power or "right, and does not imply a positive obligation."

Here the Minister had the power to take the ship and then to use it and deal with it as he might think to be expedient in the public interest; nor can one doubt that it was his duty so to do, though that duty might be one which would be described as

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(1) [1916] 1 A. C. 242.

(2) [1941] A. C. 170.

(3) Ibid. 185.

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of imperfect obligation. In other words, it was not a duty that the courts would enforce, though I have no doubt that, were the Minister to requisition a vessel, say a yacht, and use it for his private pleasure, if such a thing could be imagined, the court would very promptly interfere. The Minister must be able to decide what cargoes should, in the national interest, be carried in a ship requisitioned by him and to make such arrangements as he thinks desirable for the loading, discharge and turnround of the vessel so as to make the best possible use of her.

In my opinion, therefore, he was here, by his officers, exercising the powers conferred upon him by reg. 53 for the benefit of the public, or for what he considered to be for the benefit of the public, and so was exercising a public duty, although, no doubt, no member of the public could complain or take proceedings against them or him if he did not act as he did: see per Lord Sterndale M.R., in *The Danube II.* (1). Moreover, not only were the Minister and his officers performing a public duty, but they were, in my opinion, exercising an authority conferred upon them by the regulation. An authority to be used for the public benefit, as this was, is, in my opinion, on the authority of the *Bradford Corporation* v. *Myers* (2), a public authority.

I desire to refer briefly to *Hartin* v. *London County Council* (3). In that case the defendants had unsuccessfully prosecuted a clerk in their employment, and the action was brought by the latter for malicious prosecution. The Public Authorities Protection Act, 1893, was pleaded, and Avory J., in ruling against the plea, gave as his ground for so doing that a public duty in the statute means a duty which can be legally enforced. He accordingly held that a duty to prosecute for an offence was not a public duty within the statute. While as at present advised I should not be disposed to differ from that case in its result, I do not think that the particular reason given by the judge for his ruling can now be upheld in view of the judgment of Lord Sterndale in *The Danube II.* (1), and the passage from Lord Maugham's speech in *Griffiths* v. *Smith* (4) which I have already quoted. The latter expressly stated " public duty or " authority does not imply a positive obligation," by which I understand him to mean an obligation which can be legally enforced. It may be that a more satisfactory ground for the decision would be that a duty to prosecute is one common to all the King's subjects who believe that a criminal offence has been committed, because it is in the interests of the public that criminals should be brought to justice. It is more in the nature of a moral obligation than a legal power or right, and, if that be the true view, it could not be a public duty within the meaning of the statute.

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(1) [1921] P. 183.

(2) [1916] 1 A. C. 242.

(3) 141 L. T. 120.

(4) [1941] A. C. 170.

If it were otherwise, that is if the question depended on whether the duty was one which could be legally enforced, it would be impossible, as the Attorney-General pointed out, for officers of the Crown, the highest public authority of the realm, ever to have the benefit of the Act, for there is no means of compelling the Crown to perform any duty. At the same time, I do not desire to be taken as deciding that, whenever the defendant is an officer of the Crown, commissioned or otherwise, and is acting on behalf of the Crown, he must necessarily be entitled to the benefit of the section. I need only give as an illustration an action by a lessee of a house on Crown property against an officer acting in the course of his duty. In such a case it might well be (I say no more) that only questions of private right would arise.

I must, therefore, give effect to the plea and hold that the action is barred. Judgment will be entered for the defendants.

Judgment for the defendants.

Solicitor for defendants : *Treasury Solicitor.*
Solicitors for plaintiffs : *Ince, Roscoe, Wilson & Griggs.*

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July 18, 19.

Henn-Collins J.

H. E. GREEN & SONS *v.* MINISTER OF HEALTH.

Housing — Compulsory purchase — Land to be acquired needed for convenience of houses in different ownership—Whether land exempt from acquisition—Meaning of "house"—Housing Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 51), *s.* 75.

By s. 75 of the Housing Act, 1936, "Nothing in this Act shall "authorize the compulsory acquisition . . . of any land which ". . . . at the date of the compulsory purchase order . . . . "is . . . . required for the amenity or convenience of any house."

The exemption from compulsory purchase conferred by that section attaches to land whether or not it is in the same ownership

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

as the house for the amenity or convenience of which it is required. On the other hand, the word "house" in the section means dwelling-house and nothing else, and accordingly the exemption will not attach to land required for the amenity or convenience of a house still in course of erection, which, being uncompleted, is not yet a dwelling-house.

Appeal under the Housing Acts.

The appellants, H. E. Green & Sons, before 1939 had acquired a building estate for the purpose of its development, and, with the consent of Bristol Corporation, had constructed roads and sewers upon it, the corporation later requiring alterations to be carried out on both the roads and the sewers, for which they paid the appellants compensation. Some twenty-two houses had been completed when all building ceased because of the war, the completed houses having been sold as built and accordingly no longer being in the appellants' ownership. It was contemplated that all such houses would, in the ordinary course of development, have access to the sewers and roads on the estate, and the whole sewer system of the estate was to be connected with a sewer of the corporation, who covenanted with the appellants to allow the sewers of the estate to drain into their sewer. The benefit of that covenant was passed to the purchasers of the houses under their contracts of purchase with the appellants. In 1945 Bristol Corporation made an order for the compulsory purchase of the whole estate. The Minister of Health, after holding a public local inquiry, confirmed that order. This appeal was from the Minister's confirmation order.

Havers K.C. and *Ahern* for appellants. This compulsory purchase order, if carried into effect, would leave completed houses built and sold by the appellants, and other houses in course of erection, without rights of access to the roads and sewers on the estate. Their rights of way and of drainage would thus disappear. The order is not within the powers of the Housing Act, 1936, by s. 75 of which "Nothing in this "Act shall authorize the compulsory acquisition for the "purposes of this Part of this Act of any land which . . . . "at the date of the compulsory purchase order forms part of "any park, garden or pleasure ground, or is otherwise required "for the amenity or convenience of any house." The corporation are seeking by their order to acquire land which is required for the amenity and convenience of those houses built and sold, or in course of erection, by the appellants. The corporation are bound by contract to the appellants with regard to drainage and sewage rights and the appellants similarly bound themselves when conveyances were executed on the sale of the completed houses.

A local authority which happens to be a by-law authority and a town planning authority cannot, surely, be entitled on the one hand to grant licences and approve plans for developing an estate and on the other, as housing authority to acquire the land compulsorily and cause the work and money spent on its development to be wasted. There must be some co-ordination of their various statutory powers.

H. L. Parker for Minister of Health. The answer to the objection that the corporation have entered into a covenant with the appellants concerning sewerage, etc., is that, where a local authority are under a statutory duty to do something and are given a discretion as to the way in which that thing should be done, they cannot limit their discretion by making a contract with another person that they will not exercise it in a certain way: *Ayr Harbour Trustees* v. *Oswald* (1).

As for the appellants' main argument that the land at the date of the compulsory purchase order was "otherwise required "for the amenity or convenience of any house," the corporation are not seeking here to acquire land held with a house, but land over which the owner of a house has a right of way or right of access, including, for instance, land under which a sewer runs from the house. In such a case it is not the land under or across which the sewer or road runs which is the amenity, but the right to go over the land or to carry services over or under it. Such a right could not be enforced against a local authority acquiring the land. Its infringement would at most lead to a claim for compensation: *Kirby* v. *School Board for Harrogate* (2). Further, land required for the amenity or convenience of any house within the meaning of s. 75 must be land in the same ownership as the house: see per Luxmoore L.J. in *In re Ripon (Highfield) Housing Confirmation Order*, 1938: *White & Collins* v. *Minister of Health* (3), and per Lord Goddard C.J. in *Rex* v. *Minister of Health, ex parte Waterlow & Sons, Ld.* (4). The uncompleted houses are not, it is submitted, "houses" at all within the meaning of the Act.

Havers K.C. replied.

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(1) (1883) 8 App. Cas. 623.
(2) [1896] 1 Ch. 437.
(3) [1939] 2 K. B. 838, 851.
(4) Ante p. 485.

HENN-COLLINS J. [after stating the facts :] The question for decision concerns the meaning and extent of s. 75 of the Housing Act, 1926, and lies within a small compass. The first and foremost ground on which the appellants attack this compulsory purchase order is that, so it is contended, it is not within the powers conferred by the Act of 1936 in that the land is excluded by s. 75 because it, or some part of it, is required for the amenity or convenience of existing houses, and was so required at the date of the compulsory purchase order. The amenities in question are (*a.*) the right of way over the roads made on their estate, which roads, until the compulsory purchase becomes operative, are in the ownership of the appellants, and (*b.*) the right of drainage along the sewers which the appellants constructed and still own subject to the possible compulsory purchase. It is the fact that the houses erected do require those amenities, and that ownership by the corporation of the land from which the amenities are derived will deprive the houses of them.

It is argued for the Minister first that what s. 75 is intended to prevent is the severance of land from other land in the same ownership, so as to deprive the land which is left of amenities, and that the section does not operate to exclude from the Act land which, although it does in fact serve the amenity or convenience of other land, does not happen to be in the same ownership as it. In other words the intention of s. 75 is said to be that land which is burdened with an easement in favour of an existing house can be taken to the detriment of that house, but that land cannot be taken which is not subject to an easement only because it is in the same ownership as the house effected.

I do not find it necessary to read that section as merely referring to severance. It is true that in the cases so far decided the question has happened to be one of severance, and that the courts, proceeding naturally enough on the facts before them, have used in their judgments terms referring to severance and have said that the section is concerned with severance. That, however, was appropriate to the circumstances in which those cases were decided. Those remarks do not apply to *Rex* v. *Minister of Health, ex parte Waterlow & Sons, Ld.* (1) where a sports ground was said to be an amenity of a house. The real ratio decidendi there, however, was that the words " required for the amenity or convenience of any

(1) Ante p. 485.

"house" apply to the words "park, garden or pleasure "ground," and that the words "pleasure ground" are to be read by reference to the rule of ejusdem generis, so that "pleasure ground" does not extend beyond the category "park, garden," and so does not include a separate and distinct sports ground. I do not, however, think that that decision constrains me to hold that s. 75 is to be read so narrowly as to be applicable only to an amenity which is in or touches land in the same ownership as the house which enjoys the amenity.

It follows that there must be an existing house at the date of the compulsory purchase order. It was argued for the appellants that "house" included something other than "dwelling-house"; that it included a partially completed house. I do not think that it does. I will not refer to all the sections of the Act of 1936 which have led me to that conclusion; it is enough to say that, in my view, "house" in s. 75 means "dwelling-house" and nothing else and does not include a house which is not completed. With regard to a part of the land included in the compulsory purchase order, there was, at the date of the order, no completed dwelling-house on it, and if that were the only land to be considered there would be no ground for interfering with the confirmation order made by the Minister. As must be conceded on the facts, however, certain completed houses in question have the convenience of the rights of sewerage under and the rights of way over land now to be acquired by the corporation if the compulsory purchase order is valid. For the reasons given the land over which those conveniences operate is, in my opinion, required for the amenity or convenience of the existing houses, although they are, in separate ownership from the land which it is sought to acquire.

It was urged on behalf of the Minister that if I took that view, it would be right, instead of quashing the order as a whole, to quash it in part under the power given by sch. II. to the Act of 1936, r. 2 of which provides: " . . . the court . . . (ii.) if satisfied "upon the hearing of the application that the order, or the "approval of the plan, is not within the powers of this Act " . . . . may quash the order, or the approval of the plan, "either generally or in so far as it affects any property of the "applicant." The question, on that wording, is, first, whether the court can direct that this order shall be quashed in so far as it affects a particular piece of the appellants' property, or only in so far as it affects any of their property. In other words, is that "any" cumulative or distributive? I do not think that I am called upon to solve that matter of construction because I am wholly incompetent to make the modification of the order which would result from my adjudging merely that the amenities should be restored or preserved to the houses in question. I do not know what the effect of such an order would be. I am not sufficiently informed, and, whether or not I have power to quash the order in part, I do not feel that I ought to do it in the circumstances, and I decline to do so. Since the compulsory purchase order in my opinion goes beyond the powers given by the Act, it is my duty to quash the order confirming it, and I therefore do not pursue the subsidiary arguments which have been addressed to me.

Appeal allowed.

Solicitors for appellants: *Robinson & Bradley, for N. Strickland & Fletcher, Clifton, Bristol.*
Solicitor for Minister: *Solicitor, Ministry of Health.*

LEMON v. LARDEUR.

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June 18, 19.
Morton, Somervell and Asquith L.JJ.

Landlord and Tenant—Notice to quit—Four-weekly tenancy—Notice not expiring at end of period—Notice given by landlord's husband—Not given in name of landlord—Notice invalid.

The plaintiff was the landlord and the defendant the tenant of a dwelling-house let upon a four-weekly tenancy. No evidence was given as to the date of the commencement of the tenancy. A letter dated July 20, 1945, was sent to the defendant, which purported to be a notice to quit, in the following terms "This is "to confirm that I wish to give you a month's notice as from "August 1, 1945, to vacate 'Stella Maris'." The letter was signed by the plaintiff's husband. The plaintiff claimed possession by virtue of the notice. The county court judge held that the notice was a good notice and made an order for possession.

Held first, that in the case of every periodic tenancy, including monthly and weekly tenancies, a notice to quit must expire at the end of a current period of the tenancy: *Queen's Club Gardens*

[Reported by Miss B. A. Bicknell, Barrister-at-Law.]

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Estate, Ld. v. *Bignell* [1924] 1 K. B. 117, considered and approved. *Simmons* v. *Crossley* [1922] 2 K. B. 95, disapproved. It is for the landlord to prove that the notice he gives expires on the correct date. Secondly, that where a notice to quit is given by a particular agent, having a limited authority only, such notice should be given in the name of the principal or expressly on his behalf and, if not so given, is bad.

APPEAL from Chichester county court.

The plaintiff, Mrs. R. M. Lemon, was the owner of a dwelling-house known as "Stella Maris," at Bognor Regis, which had been let to the defendant, Mrs. Lardeur. The plaintiff was not the original landlord and the defendant did not know in fact who was the landlord. She paid the rent to a Mrs. Barter, a neighbour, who was authorized to collect it.

The plaintiff wished to obtain possession of the premises and she purported to give the defendant notice to quit by a letter, dated July 20, 1945. The letter was in the following terms: "Further to Miss Morrissey's call on you recently, this is to "confirm that I wish to give you a month's notice, as "from 1st August, 1945, to vacate 'Stella Maria.' As I "believe she explained to you, my wife and I are at present "living here in property owned by St. John's College, and they "definitely require the house for their own staff by "September 29th next, so that we must move into 'Stella "'Maris' by that date. I appreciate that it may be difficult "for you to find other accommodation in Bognor, but hope "that you will be able to make suitable arrangements by the "end of August, or early in September at the latest. If it "would be of any help to you, I will write to the local council "at Bognor supporting any application you make for accommodation and explain the circumstances to them. Perhaps "you will let me know if you wish me to do this. In any case, "I shall be grateful if you will acknowledge this formal notice." The letter was signed by the plaintiff's husband. The defendant failed to deliver up possession and the plaintiff started these proceedings in the county court claiming possession of the premises. The particulars of claim did not state when the tenancy began. This omission was not rectified by the evidence. In her defence the defendant did not admit that the plaintiff was the owner of the premises. If a tenancy agreement subsisted between the parties, she denied that it had been determined by a valid notice to quit. The county court judge held that the tenancy was a four-weekly tenancy, which had

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been determined by a valid notice to quit, and he made an order for possession.

The defendant appealed.

Jukes for defendant. The particulars of claim do not specify the nature of the tenancy or the parties to the tenancy agreement. The contractual tenancy has not been determined by notice to quit. The notice served was bad for two reasons: first, because it did not terminate with the end of a period of the tenancy. There is no presumption that a notice to quit is good. For the proposition that a notice to quit must expire with a period of the tenancy see Woodfall on Landlord and Tenant, 24th ed., 959; Foa on Landlord and Tenant, 6th ed., 669. *Simmons* v. *Crossley* (1) was wrongly decided. The law is correctly stated in *Doe d. Finlayson* v. *Bayley* (2), and *Queen's Club Gardens Estates* v. *Bignell* (3). [He also referred to *Precious* v. *Reedie* (4) and *Savory* v. *Bayley* (5).] Secondly, the notice to quit was given by the plaintiff's husband as her agent. It was given in his own name and did not purport to be given on behalf of the landlord. For this reason also the notice is invalid: Foa on Landlord and Tenant, 6th ed., 672. [He referred to *Doe d. Lyster* v. *Goldwin* (6), and *Jones* v. *Phipps* (7).] It was not suggested that the plaintiff's husband was her general agent. If the husband had merely a particular authority the notice should have been given in the name of the plaintiff: Woodfall on Landlord and Tenant, 24th ed., 964.

Victor Ruston for the plaintiff. Even if it is necessary in the case of a four-weekly tenancy for the notice to quit to expire at the end of the current period of four weeks, in this case the defendant agreed to accept the letter of July 20, 1945, as a valid notice and she is estopped from denying the validity of the notice.

MORTON L.J. There has been a conflict of judicial authority on the question whether, in the case of every periodic tenancy, the notice to quit must expire at the end of a current period. It is plainly established by authority that that is so in the case of a yearly or a quarterly tenancy, but there has been a certain conflict as regards monthly and weekly tenancies. In *Simmons*

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(1) [1922] 2 K. B. 95.
(2) (1831) 5 C. & P. 67.
(3) [1924] 1 K. B. 117, 124.
(4) [1924] 2 K. B. 149.
(5) (1922) 38 T. L. R. 619.
(6) (1841) 2 Q. B. 143, 145.
(7) (1868) L. R. 3 Q. B. 567.

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v. *Crossley* (1), a Divisional Court held that in the case of a monthly tenancy it was not necessary for a notice to quit to expire at the end of a current period of the tenancy. It is to be observed that in the case of *Doe d. Finlayson* v. *Bayley* (2) was not cited to the court. In *Queen's Club Gardens Estates, Ld.* v. *Bignell* (3), where the tenancy was a weekly one, a Divisional Court declined to follow *Simmons* v. *Crossley* (1), and Lush J. said: "I think that the true view is that in any "periodic tenancy, whether it be yearly, quarterly, monthly, "or weekly, the notice to quit must expire at the end of the "current period." For my part I am satisfied that the decision in *Queen's Club Gardens Estates, Ld.* v. *Bignell* (3) was correct. I entirely agree with the reasoning of Lush J. and with the view expressed by Bailhache J. in *Precious* v. *Reedie* (4). In my view, the case of *Simmons* v. *Crossley* (1) can no longer be regarded as good law. I may add that after the decision in the case of *Simmons* v. *Crossley* (1) there was decided a case of *Savory* v. *Bayley* (5). The tenancy in the case of *Savory* v. *Bayley* (5), as in the present case, was a four-weekly one. Bailhache J., although *Simmons* v. *Crossley* (1) was cited to him, did not follow it and came to the conclusion that the notice to quit in that case was invalid, because the notice to quit was not such as would bring the tenancy to an end at the end of a four weeks period.

This court does not know whether the notice to quit, which was given in the present case, did or did not expire at the end of a four weeks period, because the evidence does not show when any period of four weeks began or ended. It was suggested in argument that it was for the defendant to establish that the notice did not expire at the proper date, but I do not agree with that suggestion. The plaintiff has pleaded that the defendant was her tenant; she has pleaded that the tenancy has been determined by a notice and it is for her to establish that the notice was a valid notice. I think that that view of the law is supported by the case to which I have referred in passing, *Doe d. Finlayson* v. *Bayley* (2). The result is that on this ground the notice to quit is invalid.

Mr. Jukes, in his able argument for the defendant submitted that the notice to quit was invalid also on another ground, and, as the matter has been fully argued, I shall express my

(1) [1922] 2 K. B. 95.
(2) (1831) 5 C. & P. 67.
(3) [1924] 1 K. B. 117.
(4) [1924] 2 K. B. 149.
(5) (1922) 38 T. L. R. 619.

view on it. Mr. Jukes submitted that there was no evidence that the husband of the owner had a general authority to deal with her property, and that, if he only had a particular authority to deal with this particular matter, the notice was invalid because it ought to have been given expressly on behalf of the landlord, who ought to have been either named or sufficiently identified. In my view, that contention is well founded. The notice purports to be given by Mr. Lemon himself. There is no evidence that he had a general authority on behalf of his wife and I think that the notice was invalid on that ground also. I think that the law is correctly stated in Woodfall on Landlord and Tenant (24th ed., p. 964), where the learned author says: "But when a notice to quit is given by a particular "agent, having a limited authority only, such notice should "be given in the name of the principal, or expressly on his "behalf."

It follows from what I have said that the tenancy was never lawfully determined, unless in some way the defect in the notice was cured by something which occurred after the notice had been given. The learned county court judge's note says: "Defendant knew who landlord was and accepted notice as "given in correspondence and in her evidence and time was "allowed her on that footing." I can find no evidence at all, either in the correspondence or in the oral evidence, that the defendant knew at the time when she received the notice who the landlord was. On the contrary, right up to that time, according to the defendant's evidence, she thought that Miss Morrissey, the sister of the actual owner, was her landlord. The learned judge obviously placed reliance on the defendant's evidence, because he described her in complimentary terms in his judgment. I think that that finding by the learned judge, if it relates to the period before the notice was given, must be due to an oversight or some imperfect recollection of the evidence. At all events, there appears to be no evidence on which the learned county court judge could find that the defendant knew who the landlord was at the time when she received the notice. There is evidence that after the defendant received the notice she asked a Mrs. Barter, who lived next door and collected the rent, about the notice and that Mrs. Barter said she always sent on the rent to Mrs. Lemon, the plaintiff.

It was suggested by Mr. Ruston that there was some agreement which prevents the defendant from relying on the invalidity of the notice. Mr. Jukes contended that we should not allow this point to be raised at all. He pointed out, truly, that no such agreement was pleaded, although the validity of the notice was challenged in the defence; that it was not made part of the plaintiff's case at the hearing; that it was never suggested by the plaintiff's husband in evidence; and that it was not mentioned in the oral judgment of the learned judge, although in his subsequent written judgment given three weeks afterwards there occurred the passage which I have read. We were reluctant, however, to shut out the argument on these grounds and we heard Mr. Ruston on it. For my part, I think that on the materials before us it is impossible to come to the conclusion that there was such an agreement. Mr. Ruston said that the agreement amounted to the creation of a new tenancy which was to expire on September 29, 1945. Alternatively, he put it that there was an agreement between Miss Morrissey, as agent for the plaintiff, and the defendant shortly before the notice to quit was given. I think there was a further alternative that an agreement was made, after the notice had been given, that that particular notice should be taken as ending the tenancy. I think there are at least two answers to that argument. In the first place, I cannot for myself find any sufficient evidence of any such agreement. In the second place, I am unable to discover what the consideration was for the agreement if it were made. That being so, I think it is no discourtesy to the able argument presented to us if I refrain from going into the facts in full detail.

In my view, this action ought to have been dismissed and the appeal will be allowed.

SOMERVELL L.J. I agree with the judgment which has been delivered, but, as we are differing from the decision of the learned county court judge, I will add a few observations on the three main points in the case.

The first point that was taken on behalf of the defendant was that the notice to quit was invalid because it did not expire at the end of the current tenancy. I will not refer to the authorities, which have already been referred to, but I would like to say that I agree with everything that has been said about them. In this case there was no evidence as to the date in the material month or months from which this tenancy ran. As it seems to me, it was for the plaintiff (who, in her pleading, alleges that the defendant had a tenancy) to call evidence to show that that tenancy had been terminated according to law. No evidence being called by her to show that the date when the notice actually expired was in fact the end of a period of the tenancy, it seems to me that she fails on this point to establish that the notice was a good one and that the tenancy which she admits exists had come to an end. Therefore, on that point she fails on the ground that she had not shown that she had given a valid notice to quit.

There was a second point taken, namely, that the notice here was not given by the landlord but by her husband. Mr. Ruston submitted that we ought to find on the evidence that the husband was the general agent of the wife. But it seems to me impossible to come to that conclusion on the evidence before us. For one reason, Mrs. Barter, whose name was referred to in the evidence more than once, obviously had a considerable authority in dealing with the matter of this house. It is also, I think, to be observed that in this case at the time when the notice was received, according to the defendant's evidence (and the learned county court judge clearly regarded her as a reliable witness) she did not know who the owner was.

Thirdly, proceeding on the basis that the notice was invalid, Mr. Ruston said that still there was an agreement, or, possibly, an estoppel, which precluded the defendant from relying on these defects. He first of all submitted that we should find an anterior agreement, made at an interview between the plaintiff's sister, Miss Morrissey, and the defendant shortly before July 16 (the date of the first letter in the correspondence) that the notice to quit which would follow should be accepted as terminating the existing tenancy. There was some evidence given with regard to the interview between the defendant and Miss Morrissey. The defendant said that at that interview she said that she would give up the house, if she could find something else. That evidence is in direct conflict with the agreement that Mr. Ruston submitted we should find; and, so far as the judge's note is concerned, it is, I think, clear that there was no cross-examination on that particular piece of evidence. It, therefore, seems to me that the submission as to an anterior agreement fails, assuming that Mr. Ruston is entitled to raise it in this court.

He then submitted that we should find that, on the correspondence, subsequent to the notice being sent there was an agreement to treat it, or accept it, as a good notice. It is perfectly true that in that correspondence neither the defendant nor her solicitors took the point that the notice was invalid. It, no doubt, frequently happens that, when disputes arise, points are not taken which are subsequently taken when the matter comes into the hands of solicitors or counsel. But I cannot find anything in that correspondence which precludes the defendant from relying on the defects to which I have already referred or which amounts to any estoppel, which would prevent her from contending that the tenancy has not been brought to an end.

For these reasons, I agree that the appeal should be allowed.

ASQUITH L.J. I agree. There are three grounds of appeal in this case, the first one being that the notice to quit was bad. If that ground should succeed, clearly the other two do not arise. I agree that it does succeed. It is contended by the defendant, that the notice is bad on two distinct grounds; first, as not having been proved by the plaintiff to expire at the end of the stated period of the tenancy—in this case a four-weeks tenancy—and, secondly, unless the husband was the wife's general agent, as not being expressed to be given on the part of the actual landlord. There is no evidence of general agency on the part of the husband. The notice is, therefore, bad and doubly bad. In these circumstances, counsel for the plaintiff sought to rely on a contention, neither pleaded nor argued below, that there was a special agreement, as to which I will say first that I agree that he ought not to be allowed to raise it here, but that, as he has done so, the agreement on which he relies seems to me to be one which cannot be spelled out of the correspondence or deduced from the other evidence, and, if it were so deducible, it would have to be supported by a note or memorandum, which is not there.

I agree that the appeal should be allowed.

Appeal allowed. Judgment for the defendant.

Solicitors for the plaintiff: *Beaumont, Son & Rigden.*

Solicitors for the defendant: *Ravenscroft, Woodward & Co., for Staffurth & Bray, Bognor Regis.*

STAFFORD *v.* MINISTER OF HEALTH.

1946
Apr. 15.

Charles J.

Housing—Compulsory purchase order—Landowner's grounds of objection—Detailed reply by local authority without landowner's knowledge—Minister's duty to act judicially—Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51).

A landowner having been informed by the local authority of their intention to apply to the Minister of Health for confirmation of an order for the compulsory purchase, for housing purposes, of land belonging to him, he submitted notice and grounds of objection to the Minister. The Minister sent the notice and grounds, without informing the landowner, to the local authority, who sent the Minister a detailed reply. The Minister, without informing the landowner of that detailed statement of the local authority's case, and having, in the exercise of his discretion under the Housing (Temporary Provisions) Act, 1944, decided not to hold a public local inquiry, thereupon confirmed the compulsory purchase order.

Held, that the confirmation order was invalid and must be quashed, since a mere notice and grounds of objection did not constitute a presentation of the landowner's case, and, as the local authority had had an opportunity of presenting their case in detail, the Minister had acted without hearing both sides.

Appeal under the Housing Acts.

The appellant, George Stafford, was the owner and occupier of land at Mowsley, within the district of Market Harborough Rural District Council, which he used for farming. The rural district council having notified the appellant of their intention to acquire, for the purposes of Part V. of the Housing Act, 1936, land forming part of his farm, he served on the Minister notice of his objection to confirmation of the compulsory purchase order by the Minister of Health on the following grounds: "That the said piece of land is unsuitable for building purposes, there being no water available thereon. That "there are other more suitable building sites in the said village. "That I, the said George Stafford offered to the said council a "piece of land now partly used as allotments situate in the said "village which would be more suitable for building purposes. "That the erection of houses on the said piece of land will "despoil the character of the village. That the reduction "of the pasture by the acquisition of the said land will seriously "affect the carrying on of my farm by me . . ."

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

The Minister had previously taken the opinion of competent persons, including the Ministry's regional architect, who visited the land in question in company with an official of the Ministry of Town and Country Planning, and the sanitary inspector and surveyor of the rural district council, and recommended that, subject to the regional planning officer's approval, the local authority should be authorized to negotiate for the purchase of six properties, one of them being the appellant's land in question. The Minister thereupon, having received the appellant's notice and grounds of objection, sent them for comment to the rural district council without telling the appellant that he was doing so. The council sent the Minister a detailed answer in which they stated as follows: " The council, " prior to deciding that the site in question was suitable for a " housing site, engaged a water diviner to inspect and report " on the prospect of water being available. The report stated " that the diviner was of the opinion that water would be " available after boring had taken place. No other sites " suitable for erecting six houses are available in this parish. " One site only is suitable in the opinion of the council. This, " however, would only provide an area for two houses. The " land offered to the council by the said G. G. Stafford (namely, " allotment land) is totally unsuitable, as it is situated outside " the zoned residential area for town planning purposes and " would not be approved for building purposes by the planning " authority. The site selected has received the approval of the " regional planning officer and also the Leicestershire joint " planning officer, and the council cannot agree that the " character of the village would be spoilt, but improved by " the erection of the houses on this site. It cannot be agreed " that 1¼ acres of land would seriously affect the carrying on of " the owner's farm. His total acreage is approximately 100 " acres and the land proposed to be acquired is not a home " paddock. The home paddock attached to the farm is field " ordnance No. 59 on plan which is suitable for building purposes, but my council did not consider the field in view of its " usefulness to the owner adjoining his farm."

The Minister of Health being relieved by the Housing (Temporary Provisions) Act, 1944, of his absolute duty under the Housing Act, 1936, to hold a public local inquiry where a compulsory purchase order is resisted, and having decided to hold no such inquiry in respect of the order in question, the appellant heard no more of the matter until he received notice that the compulsory purchase order had been confirmed by the Minister. He now appealed against the confirmation order.

Hill for the appellant. Though the Minister now has a discretion whether or not to hold a public local inquiry, he is not relieved also of the obligation of acting in accordance with natural justice. It was not acting in accordance with natural justice to give the rural district council an opportunity of dealing fully with the appellant's bare grounds of objection, to leave the appellant in ignorance of the fact that the council had been given that opportunity, and thereupon to confirm the order. The Minister in fact acted after hearing one side only, for the appellant's notice and grounds of objection did not constitute a statement of his case as the council's detailed reply to his objections constituted a statement of theirs.

H. L. Parker for the Minister. The Minister has in effect heard both sides to this dispute. The appellant's notice and grounds of objection on the one hand and the council's detailed answer on the other constituted adequate material on which he could make up his mind as to the rival points of view. The Minister having decided, in the exercise of his discretion under the Housing (Temporary Provisions) Act, 1944, that a public local inquiry should not be held, there was nothing more that he could do before recording his decision.

Hill replied.

CHARLES J. Market Harborough Rural District Council, in giving the appellant notice of their intention to apply that the compulsory purchase order made by them in respect of the land in question should be confirmed by the Minister of Health under Part V. of the Housing Act, 1936, and asking him if he had any objection, were following the machinery prescribed by the Act with meticulous care and propriety. The appellant who, for a number of reasons, had the greatest objection to the proposed compulsory purchase, sent to the Minister of Health notice and grounds of objection. Mr. Parker, for the Minister, contends that that statement of objections is the appellant's case. I do not think that it is. It is only a fulfilling of the duty to object which rests on him if he desires to resist the compulsory purchase order. [His Lordship read the appellant's grounds of objection, and continued :] All the grounds of objection, certainly the last, require implementation. They are mere statements, and give the rural district council no information. They are what they set out to be, grounds of objection and nothing more. [His Lordship stated the facts, read the council's reply to the appellant's objections, and continued :] The whole of that answer is full of the most controversial matters. On the one side the Minister had simply the appellant's naked grounds of objection, and on the other the council's detailed answer raising matters—I assume by way of answer to the objections—which are patently controversial. That answer was never communicated to the appellant. The next thing that he heard in the matter was a notice that the order to which he had objected had been confirmed. Without delay he appealed to this court, his case, in short, being that he has not been heard ; that, in accordance with the Act of 1936, he, within the prescribed time, submitted a notice and grounds of objection, that he has a great deal of evidence which he wishes to submit to the Minister and, which, he says, will show that the council's answer cannot be substantiated ; that he has never had a chance of pointing that out ; and that the Minister has, in fact, heard one side only.

The only answer which Mr. Parker, for the Minister, can suggest to that contention is that the notice of objection with its grounds is, in fact, a statement of the appellant's case. I cannot come to any such conclusion. The appellant's objections are simply blank statements or contentions. If the Minister desired to hear both sides, as I am sure that on reflection he would, all that he had to do was to pass the council's detailed answer to the appellant, who would then have set out his case in extenso and not merely, as he did, in headings of grounds of appeal. To my mind it is going a great deal too far to say that once grounds of appeal have been put forward—considered as grounds of appeal such as are put in in an ordinary King's Bench action—no argument or elaboration is needed, and that the grounds constitute a complete case with all its evidential statements. I cannot see that that is so.

Accordingly, I am bound to come to the conclusion that the Minister did not hear both sides before he confirmed the order. In the words of Lord Loreburn L.C., in *Board of Education* v. *Rice* (1) : " They " that is, those who are to make orders, " can obtain information in any way they think best, always " giving a fair opportunity to those who are parties in the " controversy for correcting or contradicting any relevant " statement prejudicial to their view." It is not necessary for me to elaborate that elementary statement, which is really in accordance with the principles of British justice. In *Errington* v. *Minister of Health* (1), Greer L.J., cited the following passages from the opinion of Lord Haldane L.C., in *Local Government Board* v. *Arlidge* (2): " My Lords, when the duty " of deciding an appeal is imposed, those whose duty it is to " decide it must act judicially." (It is admitted by Mr. Parker that, after the appellant had sent in his objections, the Minister was in a quasi-judicial position.) " They must deal with the " question referred to them without bias, and they must give " to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the " spirit and with the sense of responsibility of a tribunal whose " duty it is to mete out justice."

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(1) [1911] A. C. 179, 182.

As I have already said, the mere giving of the notice of objection, in accordance with the statutory requirement, and setting out the grounds of objection is not an adequate presentation of the appellant's case. If the rural district council's view was to be taken, and it was proper that it should be, it ought to have been communicated to the appellant, who should then have had an opportunity of presenting in adequate form the case which he had done no more than adumbrate by the headings in his grounds of objection. That being my view, the order as confirmed is bad and must be quashed.

I would add that the appellant has said that he has a right to a public inquiry. He has not. It is clear that under the Housing (Temporary Provisions) Act, 1944, there is absolute discretion in the Minister whether to hold a public inquiry or not. The appellant has, however, the inalienable right of every citizen to have his case considered before the adjudicating authority comes to a decision. He has not had that advantage.

The appeal is allowed with costs.

Appeal allowed.

Solicitors for appellant: *Bennett, Ferris & Bennett, for Bray & Bray, Leicester.*

Solicitor for Minister: *Solicitor, Ministry of Health.*

(1) [1935] 1 K. B. 249, 265. (2) [1915] A. C. 120, 132.

1946
July 25.

Henn-Collins J.

MILLER *v.* MINISTER OF HEALTH.

Housing—Compulsory purchase of land—Notice of objection—Duty of Minister—Matters to be taken into consideration—Objector not entitled to implement notice in all cases.

In confirming a compulsory purchase order made by a local authority under the Housing Act, 1936, the Minister of Health is entitled to take into consideration, without disclosing it to an objector, information previously obtained by him in his administrative capacity, including information regarding the views of other Government Departments as to the suitability of the site in question.

An objector is not entitled to elaborate his grounds of objection or to be heard further when there is no evidence that the Minister has not accepted the assertions made in his notice of objection.

Stafford v. *Minister of Health,* Ante p. 621 distinguished.

APPEAL under the Housing Acts.

The appellant, a dairyman, owned fourteen and a half acres of pasture land at Doddington, Cambridgeshire, within the area of the North Witchford Rural District Council. He received a notice dated February 19, 1946, from the council stating that the council required to purchase compulsorily one-sixth of an acre of the appellant's land for the purposes of Part V. of the Housing Act, 1936. On March 5, 1946, the appellant, by his solicitors, submitted a notice of objection to the Minister of Health, stating the grounds on which he objected to the making of a compulsory purchase order. One of his grounds of objection was that there was other more suitable land available for the council's housing scheme and that it was not necessary for the purpose of the scheme to take the land in question. The Minister of Health nevertheless confirmed the compulsory purchase order and gave the appellant notice of such confirmation on May 1, 1946.

In confirming the compulsory purchase order the Minister took into consideration a letter dated September 13, 1945, from the Regional Planning Officer to the Clerk to the North Witchford Rural District Council, which read as follows :—

" Dear Sir, Housing—Permanent.

" In connection with your council's housing programme we " have now received the observations of the other interested " Government Departments. The following sites are considered " satisfactory and are cleared :—

* * * * *

"2. Doddington South of Eastall's Road.

* * * * *

"In respect of these sites you will, of course, have "appreciated from the appropriate circulars that the next "step, if not already taken, is (*a*) to obtain sanction to the "use of the sites from the Ministry of Health at Cambridge, "and (*b*) to submit the necessary layout plans to the Senior "Regional Officer, Ministry of Health, Cambridge, for "approval."

No notice of the above letter was given to the appellant.

The appellant appealed to the High Court on the grounds that the Minister failed to inform him of representations or evidence submitted by the rural district council in support of the order or to permit him to submit representations or evidence either to meet those put forward by the council or in support of his own notice of objection and that the Minister failed properly to consider his objections.

Squibb for the appellant. The Minister was wrong in taking into consideration the letter of September 13, at least without disclosing it to the appellant. Such action by the Minister amounts to a breach of his duty to act with natural justice. Secondly the Minister failed properly to consider the appellant's objections, since he gave the appellant no opportunity to explain the bare statements set out in his notice. On this point the case is indistinguishable from *Stafford* v. *Minister of Health* (1). It is not sufficient for the Minister to consider merely the grounds of objection in the notice. He must consider the whole objection. Here the Minister has not done justice because he never had all the proper material before him.

H. L. Parker for the Minister of Health. It is admitted that the Minister must act with natural justice, but the real question here is, has the Minister, within the framework of the Act, so departed from natural justice as to enable it to be said that he has not complied with the requirements of the Act. The matters which the Minister may take into consideration were discussed in *Errington* v. *Minister of Health* (2). There is nothing in the Act which entitles an objector to give any oral evidence or to do more than state the grounds of his objection in writing. No doubt if the Minister consults the council, as in *Stafford's* case (1), he must give the objector an opportunity of a further hearing, but he is not bound to consult the council. It is clear from *Offer* v. *Minister of Health* (1) that the Minister does not have to act judicially or quasi-judicially until he comes to consider objections. In the present case the letter of September 13 has nothing to do with the objections raised by the appellant and there was nothing contrary to natural justice in not sending a copy of it to him. The information in that letter was obtained by the Minister in his administrative capacity and there was no obligation on him to communicate it to the appellant. The remarks of Charles J. in *Stafford's* case (2) must be read in the light of the particular facts of that case and do not apply to the present case.

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(1) Ante p. 621.

(2) [1935] 1 K. B. 249.

Squibb replied.

HENN-COLLINS J.: The complaint is that the Minister, in confirming the order made by the North Witchford Rural District Council, first of all took into consideration a certain letter of September 13, 1945, of which the complainant, John Parkinson Miller, had no notice or knowledge, and secondly that the objector was not given an opportunity to state his representations or evidence in support of his notice of objection, and that therefore that standard of judicial procedure which is required of the Minister was not conformed to.

I think one must remember in approaching these matters that the question what a Minister shall or shall not do when acting administratively is not one that can be determined on any principle of law, nor yet on any principle, as I see it, of natural justice, as between the Minister and any one member of the community. The Minister, acting in his administrative capacity is governed by considerations of expediency only. He has to decide—ultimately, I suppose, subject to the review and governance of Parliament—what in his view is best for the community. No principle of natural justice as between any individual and the Minister of the Crown has any place in that kind of administration, but when questions as to whether those administrative powers should be exercised have been referred to him by Act of Parliament, in this case the Housing Act, 1936, at that point he has to consider judicially the matter that is so brought before him. That does not mean, as the authorities have shown, that he is not to use any

(1) [1936] 1 K. B. 40. (2) Ante p. 621.

knowledge which has come to him, so to speak, extra-judicially, but all the material which has been formulated for his judicial consideration must be available to him on both sides. That is the meaning of his acting with natural justice in a judicial capacity.

It is said in this case that he had such material before him in the letter of September 13, 1945, which is disclosed in the affidavit of the officer whose duty it was to consider this particular order. That was a letter which came into existence long before this " lis," as it has been conveniently described in some of the authorities, was ever adjudicated. It was a letter which said in effect that the other Government Departments concerned would have no objection from their point of view, that is to say, from the point of view of the Ministers whose interests they represented, if the proposed order were to go through. That was the extent of the outside information, so to speak, that the Minister had with respect to the order that the local authority proposed, and the objections of the present appellant. Was the Minister not entitled to consider that letter of September 13? Obviously it was a matter he could not have disregarded. He obtained it administratively. It was necessary from the administrative point of view to know what the views of the other departments were, and if any of them had put a veto upon the proposed order no doubt that would have been respected. After all, the Government is one, although for convenience it may be divided into departments. I do not think there is any substantial complaint to be made of the letter of September 13 having been considered by the Minister before he began to act in a judicial capacity.

Then it is said by the appellant: You have not given me an opportunity of elaborating the objections that I have made. That objection is given some force and colour by reference to *Stafford* v. *Minister of Health* (1) decided by Charles J. On the facts, that was a very different case. What had happened there, shortly, was that the appellant had lodged his grounds of objection in writing. On that, the Minister applied again to the council, as it were, the other party, supplied them with the grounds of objection, and obtained their comments upon them. The judge, not surprisingly, held that it was contrary to natural justice to obtain a reply from one of the parties in the absence of the other, so that other had no

(1) Ante p. 621.

chance for comment or discussion of any sort. It was clear on that state of facts that the Minister was not accepting, as going without further discussion, the matter that the appellant had set forth in his notice, because it must have seemed to the Minister that such matter required some reply from the council. In other words, the Minister was obviously not accepting what the appellant was asserting in his notice of objection. What Charles J. was saying, as I read that case, is not that it is not enough for an appellant to put forward his grounds of appeal, or that if an appellant so does, the Minister must hear him further, or give him further opportunities of appealing, but, as he states in his judgment (1), that the appellant's objections as set out in his notice "are simply blank statements or "contentions, and if the Minister desires to hear both sides, "as I am sure upon reflection he would, all he had to do was to "pass the council's detailed answer to Mr. Stafford who "would have set out his case in extenso and not merely in "headings of grounds of objection." Apt as that is to the circumstances of the case before Charles J., it does not seem to me to be apt to the circumstances of this case, because here there is nothing to show that the Minister was not in fact accepting everything the appellant was saying in his notice of objection, but despite that acting administratively. I started by pointing out there are no limitations imposed by natural justice on the action the Minister takes administratively, and I do not think it can possibly be said in this case that his failure to allow the appellant to elaborate what he said in his notice is contrary to natural justice, or that on that ground the order should be quashed.

In my opinion, this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Culross & Co., for Ollard & Bentley, March.*

Solicitor for Minister of Health: *Solicitor, Ministry of Health.*

H. A. P.

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(1) Ante p. 624.

Observations of MORTON, L.J., at p. 640, *explained.* [1948] 2 All E.R. 627

Dicta of MORTON, L.J., at p. 638, *applied.* ARTILLERY MANSIONS, LTD. *v.* MACARTNEY. [1948] 2 All E.R. 375.

PALSER *v.* GRINLING.

C. A.

1946

July 15, 16, 30.

Morton, Somervell and Asquith L.JJ.

Landlord and tenant—Rent restriction—Flat let at rent including payments in respect of attendance—Whether " substantial portion of whole rent "—Method of ascertainment—Rent & Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1*—Rent & Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*) *and sch. I.*

A flat was let at a rent of 175*l.* which included payments for attendance but it was found that the part of the rent attributable to the payment for attendance, regard being had to the value of the same to the tenant, was not more than 14*l.* :—

Held, that this was not a substantial portion of the whole rent and therefore that the joint effect of the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 2 (*b*) and the Rent and Mortgage Interest Restrictions Act, 1923, s. 10, sub-s. 1, did not exclude the flat from the operation of the Rent Restriction Acts.

Where premises are let with the benefit of attendance supplied by the landlord, including a particular attendance which the tenant does not require, it is for the tenant, if he wishes it not to be taken into account in ascertaining the part of the rent attributable to payment for attendance, to show that at the time when the tenancy agreement was entered into he had asked to have this attendance excluded as useless to him.

For the purpose of ascertaining whether the payments attributable to attendance or the use of furniture is a substantial part of the whole rent it may be taken that in the absence of special circumstances 20 per cent. of the whole rent is a substantial portion, any portion under 15 per cent. is not, and any portion from 15 per cent. to 20 per cent. constitutes a border-line case.

The method suggested of arriving at " the amount of rent which " is fairly attributable to the attendance, regard being had to the " value of the same to the tenant " so as to produce a result fair to both landlord and tenant.

APPEAL from Lord Goddard C.J.

By an agreement, dated February 16, 1944, the plaintiff Emily M. M. Palser let to the defendant Sally Grinling a flat containing a sitting-room, bedroom, kitchen and bathroom in Chantrey House, Eccleston St., for the term of one year from March 25, 1944, at the rent of 175*l.* per annum. The landlord covenanted with the tenant to keep clean the entrance hall, staircases and passages of the building which contained twenty-four flats and to pay the rates. He was also to provide a porter and, under one of the general regulations contained in the agreement, no tradesmen or other persons intending to deliver goods or parcels or to take orders were to be allowed

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to use the main entrance hall or the staircases or passenger lift leading to the flats; and as the flat had no tradesman's lift, goods and parcels had to be handed to the porter. Under another regulation all coal required by the tenants was to be sent up to the flats before 10 a.m. by the resident porter and any refuse from each flat was to be placed in a receptacle to be emptied and returned by the porter.

The defendant having failed to give up possession on March 25, 1945, the plaintiff commenced proceedings on April 30, 1945, to recover possession of the flat and mesne profits. By her defence the defendant claimed to retain possession of the flat as a dwelling-house to which the Rent Restriction Acts applied by reason of the rates being 44*l.* on April 6, 1939. She also counterclaimed for 88*l.* 14*s.* 6*d.* as rent paid above the standard rent of 130*l.* 14*s.* 3*d.* during a period of two years. In reply the defendants relied on s. 3, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1939 (1) and s. 10, sub-s. 1 of the Rent and Mortgage Interest Restrictions Act, 1923 (1) as making the Acts inapplicable because the flat had at all times since 1943 been bona fide let at a rent which included payment in respect of attendance that formed a substantial portion of the whole rent.

Evidence was given that the porter employed for the building was paid 4*l.* a week and was provided with a flat, and that as there were twenty-four flats in the building, though of varying sizes, the share of the costs of providing the porter attributable to the particular flat was one twenty-fourth of the total cost or 14*l.* per annum. It was also proved that the corresponding share of the cost of keeping the entrance hall staircases and passages clean was 6*l.* 6*s.* per annum. There was also evidence that the defendant had electric fires in her flat and had therefore no use for coal. The Lord Chief Justice said that the real service the defendant received from the porter was the removal of refuse and the acceptance by him of parcels and goods left at the entrance door. It was suggested that 14*l.* would be the fair proportion of the porter's remuneration. The rent of the flat was 175*l.*, less 29*l.* for rates paid by the plaintiff, which reduced the rent to 146*l.* A substantial part of the 14*l.* was to the advantage of the plaintiff who must be responsible for seeing that the refuse from the flats was taken away and put out for the local authority to collect. He was of opinion that the amount of the rent fairly attributed to the services of the porter did not constitute a substantial part of the whole rent. He must therefore dismiss the action and give judgment in favour of the defendant on the counterclaim. The plaintiff appealed.

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(1) Rent and Mortgage Interest Restrictions Act, 1939: "The "principal Acts shall not by virtue "of this section apply . . . "(*b*) save as expressly provided in "the said Acts, as amended by "virtue of this section, to any "dwelling-house bona fide let at "a rent which included payments "in respect of board, attendance "or use of furniture."

Rent and Mortgage Interest Restrictions Act, 1923 (as amended by the First Schedule to the Act of 1939): "For the purposes of "s. 3, sub-s. 2 . . . of the Rent "and Mortgage Interest Restric"tions Act, 1939 . . . a dwelling-"house shall not be deemed to be "bona fide let at a rent which "included payments in respect of "attendance or the use of furniture "unless the amount of rent whch "is fairly attributable to the "attendance or the use of the fur"niture, regard being had to the "value of the same to the tenant, "forms a substantial portion of "the whole rent."

Scott Henderson K.C. and *James MacMillan* for the plaintiff. The services supplied by the plaintiff as landlord disentitle the defendant as tenant to the benefit of the Rent Restriction Acts. By s. 3, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1939, the principal Acts are not to apply to any dwelling-house bona fide let at rent including payments in respect of board, attendance and use of furniture. By section 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, it is provided that for the purpose of s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a dwelling-house is not to be deemed to be let at a rent including attendance and use of furniture, unless a substantatial part of the whole rent is fairly attributable to the attendance and use of furniture. This also applies to s. 3, sub-s. 2, of the Act of 1939. The landlord's covenants in the lease are to keep the hall and staircase clean, to provide a porter who dealt with tradespeople and received parcels, to provide for emptying refuse left outside flats, and to deliver coal to the flat. The proportional cost of providing a porter was 14*l.* per annum for the flat and the cost of cleaning the hall and staircases cost proportionately the further sum of 6*l.* 6*s.* The Lord Chief Justice refused to include the latter amount in view of what was said in *Engvall* v. *Ideal Flats, Ld.* (1). He also refused to take into account the costs of carrying coal because the tenant did not use coal fires. This was wrong because at any time the tenant might take to

(1) [1945] 1 All E. R. 230.

coal fires. The material word for the court to consider is "attendance" as opposed to services, which includes removal of rubbish and supplying of coal: *Nye* v. *Davis* (1); *Dick* v. *Duncan* (2). There was no ground for excluding the 6*l*. 6*s*. or a sum in respect of supply of coal. All the items taken together of 14*l*. and 6*l*. 6*s*. and a further sum in respect of the right to delivery of coal are a "substantial" part of the rent within the meaning given to that word in *Regents Estates, Ld.* v. *Kerner* (3). It means a little more than trifling. It is the value of the attendance to the tenant that must be taken into account. [Morton L.J. Does that mean the value to the particular tenant? If not, the landlord might include in the letting some valuable articles of furniture which the tenant did not want.] Then they would not be bona fide included in the letting, if the tenant had protested that he did not want them at the time of the letting.

[Somervell L.J. referred to *Wilkes* v. *Goodwin* (4).]

Cartwright Sharp K.C. and *Alexander Karmel* for the defendant. The tenant already had electric fires installed when the lease was granted and it would therefore be ridiculous to take the obligation to supply coal as of value. The porter's attendance was to receive parcels and goods, an attendance of negligible value. [They referred to *Wood* v. *Carwardine* (5).] The word "services" is far wider in meaning than attendance: see for a definition of services, s. 12 of the Furnished Houses (Rent Control) Act, 1946. The only matters treated as attendance in previous cases are delivery of coal and removal of refuse. The amount of the porter's pay apportioned to the flat is excessive. It is not one twenty-fourth of his pay but about one fortieth, having regard to the rents of the flats in the building, those for larger flats being far greater than that for the defendant's flat.

A mistake made by the learned judge here was to deduct rates from the rent in considering whether the part of the rent attributable to services was substantial. It is the whole rent that has to be taken into account: *Somershield* v. *Robin* (6). It cannot then be said that the part of the rent attributable to services is substantial. It is not sufficient that a trifling part of the rent should be attributed to attendance, for that

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(1) [1922] 2 K. B. 56.
(2) [1923] W. N. 90.
(3) Estates Gazette, Dec. 23, 1944, p. 575.
(4) [1923] 2 K. B. 86.
(5) [1923] 2 K. B. 185.
(6) Ante p. 244.

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would be to disregard the word "substantial" introduced by the 1923 Act.

[They also referred to *King* v. *Millen* (1).]

Scott Henderson K.C. replied and referred to *Gray* v. *Fidler* (2).

Cur. adv. vult.

July 30. Their Lordships read the following judgments.

MORTON L.J. (after stating the facts): The joint effect of s. 3, sub-s. 2, (*b*) of the Act of 1939 and s. 10 of the Act of 1923, is to exclude from the operation of the Acts any dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or the use of furniture, provided that the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. It was rightly conceded by counsel that s. 10 of the Act of 1923 applies to all dwelling-houses which would otherwise be brought within the scope of the Acts, whether by the Act of 1939 or by any earlier Act. It is not suggested in the present case that the flat in question was let at a rent which included payments in respect of board or use of furniture.

It was, therefore, necessary for the court to decide two questions: (1.) Was this flat bona fide let at a rent which included payments in respect of attendance? (2.) If so, did the amount of rent which was fairly attributable to the attendance, regard being had to the value of the same to the tenant, form a substantial portion of the whole rent? These are questions of fact, and, in my view, where the rent or the rateable value of a dwelling-house is such as to bring it prima facie within the operation of the Acts, the burden is on the landlord to satisfy the court that each of these two questions should be answered "Yes." The case was tried by the Lord Chief Justice, who came to the conclusion, after hearing evidence, that question (1.) should be answered in the affirmative, but that the amount of rent fairly attributable to the attendance did not form a substantial portion of the whole rent. He, therefore, held that the defendant was protected by the Acts, and gave judgment for her in the action and on the counterclaim. From that decision the plaintiff appeals, and in the course of the hearing we were informed by counsel on both sides that county court judges all over the country have found

(1) [1922] 2 K. B. 647.

(2) [1943] K. B. 694.

great difficulty in applying the provisions of s. 10 of the Act of 1923, and that they would welcome any expression of opinion by this court as to how that section should be applied.

As the question in each case is one of fact, it must of course be determined by the judge on the evidence before him, but, in view of counsel's request, I shall first state my views on certain questions arising on the construction of the section, and I shall then apply these views to the facts of the present case. In my judgment: (*a*) In a case such as the present, where the dwelling-house is one flat in a block of flats and where the landlord supplies a staff of employees to look after the block, it is not every service rendered by these employees which comes within the meaning of the word " attendance " as used in this section. Lord Greene M.R., said in *Engvall* v. *Ideal Flats, Ld.* (1): " In the present case a variety of services, to use a " general expression, was provided for. Certain of them " admittedly fall within the meaning of the word ' attendance ' " in the 1923 Act, s. 10. Others admittedly fall outside the " meaning of that word. To take an example, it is not suggested " that the services which consisted in the provision of hot water " and heating fall within the meaning of the word " ' attendance '." It is clear that the removal of refuse from a tenant's flat and the carrying of coal to his flat are " attendance." See, for instance, *Nye* v. *Davis* (2). That was a decision of a Divisional Court with which I entirely agree. On the other hand, in the case of *King* v. *Millen* (3) it was held by a Divisional Court that keeping clean the main entrance hall and staircase of the block of flats was not " attendance " within the meaning of the section. In that case Bailhache J., said: " There is no demise of the hall and staircase to the " tenant, but a mere easement is given to him, and, in my " opinion, a mere contract to keep clean something which is " not demised to the tenant does not amount to ' attendance ' " within the section. There is nothing in the nature of personal " service rendered to the tenant such as there was in *Nye* v. " *Davis* (2)." That was a decision on the wording of s. 12, sub-s. 2 (i.) of the Act of 1920, but I think the reasoning of Bailhache J. applies equally to s. 10 of the Act of 1923. The decision in *King* v. *Millen* (3) is now twenty-four years old. I am not aware that it has ever been questioned, and the legislature must be presumed to have been aware of the decision when the word "attendance" was reproduced in the Act of 1923. I think that the decision was right, but, even if I felt some doubt on the matter, I should be slow to differ from it in these circumstances. In *Wood* v. *Carwardine* (1) McCardie J., held that the supply of "a good and sufficient supply of hot "water for the flat at all times of the day" did not constitute "attendance" within the section. I am not sure that I entirely agree with the learned judge's reasons for that view, but I concur with him in thinking that in using the word "attendance" the legislature did not contemplate such a matter as the supplying of hot water through a hot water system.

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(1) [1945] 1 All E. R. 230, 233.

(2) [1922] 2 K. B. 56.

(3) [1922] 2 K. B. 647.

(*b*) It is fair to assume that the landlord has passed on to each tenant the cost of providing "attendance" to the flat occupied by that tenant, and that this cost is therefore reflected in the rent.

Following upon these observations, I think that the following method of arriving at "the amount of rent which is fairly "attributable to the attendance, regard being had to the value "of the same to the tenant" should produce a result which is fair to both parties, though, of course, the judge in each case is free to follow the method which he thinks most appropriate to the circumstances of that particular case.

1. Normally the attendance will take the form of the provision by the landlord of employees who are engaged in performing certain duties relating to the whole of the flats in the block. The first step in ascertaining the amount of the rent of any one flat which is fairly attributable to this attendance is to ascertain the total annual cost to the landlord of providing these employees.

2. The judge must next ascertain how much of the advantage which the tenants obtain from the services of these employees can fairly be described as "attendance" within the meaning of s. 10. I have already pointed out that there may be services which benefit the tenants but are not "attendance" within that section, and I would add that the judge should, in my view, disregard any attendance to which the tenants have no contractual right.

3. The next stage is to consider how far (if at all) the attendance is for the benefit of the landlord and how far it is for the benefit of the tenants. As was said by Lord Greene M.R. in *Engvall* v. *Ideal Flats, Ld.* (2): "What the tenant has paid for "is that element in the advantage of the attendance which goes "beyond the landlord's own advantage."

(1) [1923] 2 K. B. 185.

(2) [1945] 1 All E. R. 230, 234.

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4. Having got so far, the judge is in a position to say what portion of the annual cost is attributable to "attendance" upon the tenants. The problem then arises as to how that portion should be split up as between the individual tenants. For instance, if in a block of flats there are twenty-four flats, eight of which are large, eight of which are of moderate size, and eight are small, ought this portion of the annual cost to be divided equally among the twenty-four flats, or should it be divided in proportion to the size of the flats, or should it be divided in proportion to the respective rents paid by the tenants? This is a matter which may depend on circumstances, but I am inclined to think that the fairest method would usually be to count the number of rooms, disregarding bathrooms, and (taking an example) to attribute twice as much to an eight-roomed flat as to a four-roomed flat. This is a rough and ready method, but I think it is fair to assume, in normal cases, that the former flat is likely to produce twice as much refuse and to require twice as much fuel as the latter flat.

5. I think the judge must next consider whether there are any special circumstances providing grounds for attributing to the tenant of the particular flat in question either more or less than his proportion of the cost of providing attendance, arrived at in the above manner. For instance, suppose that part of the attendance provided is the carrying of coals to the flats by a man employed by the landlord: is it right that a portion of the cost of this labour should be attributed to a tenant who chooses to instal electric fires in all his rooms? This is a matter which was much argued before us. My own view is that if the carrying of coals is a service which the landlord undertakes to provide for a tenant, then prima facie that service is of the same value to that tenant as it would be to any other tenant, and the burden is upon the tenant to satisfy the court that less than his arithmetical proportion of the cost should be attributed to him. For instance, the tenant might prove that when the terms of the lease were being arranged, he told the landlord that he did not require this service, and that the landlord could make the appropriate alteration in the lease. If, in these circumstances, the landlord insisted on keeping to his common form of lease, which included this provision, the judge might well think that the amount of rent which was fairly attributable to that particular attendance was little or nothing.

In *Engvall's* case (1) the Master of the Rolls said: "With

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(1) [1945] 1 All E. R. 230, 234.

"regard to No. 19—the provision of personal services of a "caretaker for the purpose of carrying up wood, coals and so "forth—the fact is that the tenant used electric fires and did not "make use of those services, and had no need for them. The "judge, accordingly, held (and I think he was fairly entitled "to hold) that no value to the tenant must be attributed to that "particular undertaking by the landlord" I am sure Lord Greene did not intend to lay down any general rule that, if a tenant in fact makes no use of a particular "attendance" which the landlord has contracted to give, no part of the rent must be attributed to that attendance. I think the important point is—what did the parties contemplate at the time when the lease was granted? I observe that in *Engvall's* case the county court judge said (1): "In a case like this, where presumably "there is a standard form of agreement for a number of flats, "any one particular tenant may prove that the attendance "indicated in the agreement is of no use whatever to him, "and while it cannot be right that a tenant, deliberately "ceasing to avail himself of attendance in order to claim that "it is of no value, can attract the protection of the Rent Acts, "nevertheless, in my view, where the letting takes place in "circumstances where certain things provided for could not be "of value to the tenant, the mere fact that the landlord "contracted to provide them cannot entitle him to ignore their "uselessness in fact and claim that they are of value." I emphasize the words "could not be of value" and, as I read the judgment, the learned county court judge held, as a fact, that both parties knew this fact at the date of the lease.

6. This last observation brings me to a somewhat difficult question. In considering the amount of rent which is fairly attributable to the attendance, should one consider the position as at the date when the lease was signed, or as at some later date? The matter may be of great importance, as the cost of providing services may greatly increase during the period of the lease. In *Engvall's* case (2) the county court judge took the view that the circumstances existing at the date when the lease was signed must be considered, and that subsequent alterations in the cost of providing attendance did not enter into the matter. This matter is not expressly dealt with in the judgments of the Court of Appeal in that case, but Lord Greene M.R., said: "The question whether or not the amount "referable to items of attendance forms a substantial portion

(1) [1944] L. J. N. C. C. R. 184, 193. (2) Ibid. 196.

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" of the whole rent is eminently a question of fact and degree " to be decided without appeal by the county court judge. The " only way in which his decision could be attacked would be by " saying that he had fallen into some error of law in applying " his mind to the question. I cannot find that the judge in this " case fell into any error of law." It would appear, therefore, that the court must have approved the method which the county court judge adopted of taking into account only the circumstances existing at the date of the lease and I accept that method. It might possibly be contended that this view is inconsistent with the decision of this court in *Mann* v. *Merrill* (1), but I think that different considerations apply to the section which was considered by the Court of Appeal in that case.

Whatever method the judge employs, it seems to me that, having fully considered all the relevant circumstances, he must arrive at an actual figure in pounds, shillings and pence as being " the amount of rent fairly attributable to the attendance, " regard being had to the value of the same to the tenant." His next task is to determine whether that amount of rent " forms a substantial portion of the whole rent." The whole rent is expressed in money, and, sooner or later, as it seems to me, the judge, having ascertained what portion of the whole rent is fairly attributable to the attendance, will have to consider whether that portion is a substantial portion of the whole rent. The Act gives him no guidance in this, and I can imagine a wide difference of opinion among judges as to what is a substantial portion. For instance, if the whole rent is 100*l.*, is 15*l.* a " substantial " portion of that rent ? The legislature has not seen fit to lay down any particular percentage as being a substantial portion, and I have carefully considered whether it would or would not be of assistance to judges who have to determine this difficult question if I gave some indication of my own view as to what proportion of the rent forms a substantial portion of the " whole rent " within the meaning of s. 10. We were invited by Mr. Cartwright Sharp to give some indication of this kind, and, on the whole, I think it is right to do so now, but I do not think it would be right to fasten upon a particular percentage and say " This is a substantial portion " and any percentage below this is not a substantial portion." I am, however, prepared to say that, in my view, in the absence of special circumstances, twenty per cent. of the whole rent

(1) [1945] W. N. 106.

would be a substantial portion, any portion under fifteen per cent. would not be a substantial portion, and any portion from fifteen per cent. up to twenty per cent. would be a "border "line" case. I do not think it would be proper to go further than this, as the legislature obviously did not intend to lay down any hard and fast rule. Mr. Scott Henderson submitted that even as little as five per cent. of the total rent was "substantial," and he relied on some observations of Lord Caldecote C.J., in a case of *Regent Estates Co., Ld.* v. *Kerner* (1). The decision in that case may have been justified, having regard to the very wide admission made as to the services which constituted "attendance"; but Lord Caldecote is reported as saying: "As to the meaning of 'a substantial part of the rent,' this "could only be interpreted as meaning a real part and not a "mere trifle. It could not mean one-half or one-quarter or "one-third or anything of that sort; it meant something "which could be recognized and ascertained and quantified." If these observations are correctly reported, I am unable to agree with them. I think that s. 10 of the Act of 1923 was intended to make a marked alteration in the law as stated by Bankes and Scrutton L.JJ. in *Wilkes* v. *Goodwin* (2), whereas Lord Caldecote seems to have re-stated the law in substantially the same terms, notwithstanding the passing of the Act of 1923.

I would add, with all respect to judges who have thought otherwise, that, in my judgment, it is wrong for the judge to deduct the rates from the rent—in cases where the rates are paid by the landlord—and then to compare the amount of rent fairly attributable to the attendance with the figure so arrived at. The section refers to the *whole* rent, and I think there is clear authority for the proposition that in ascertaining the whole rent it is not legitimate to make any deduction on account of rates. (See *Somershield* v. *Robin* (3).) In the present case, this point was ultimately conceded by counsel for the plaintiff. It is true that in *Maclay* v. *Dixon* (4) this court declined to interfere with the decision of a county court judge who had deducted rates amounting to 6*l.* from a total rent of 80*l.* and had then held that 13*l.*, the part of the rent attributable to the furniture, was a substantial portion of 74*l.* This court did not, however, express any view that the county court judge

(1) Estates Gazette, December 23, 1944, p. 575.

(2) [1923] 2 K. B. 86.

(3) Ante p. 244.

(4) [1944] 1 All E. R. 22.

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was right in deducting the 6*l.* for rates. As to the " substantial " portion " point, the case was, in my view, a " border line " case and there were special circumstances which assisted the county court judge in arriving at his conclusion.

I now proceed, at long last, to apply the method suggested above to the facts of the case now before this court. The services relied on as being " attendance " within s. 10 include certain matters which were held not to be " attendance " in the cases of *King* v. *Millen* (1) and *Wood* v. *Carwardine* (2). There remain only the carrying of coals and the removal of refuse. As to the former, the defendant did not, in my view, discharge the burden of proof mentioned in para. 5 above. In her examination-in-chief the defendant gave the following evidence: " (Q.) Do you receive any coal in the flat? (A.) No. " (Q.) Have you in fact got electric fires? (A.) Yes." This evidence appears to relate to the position on the date of the hearing (March 15, 1946), and is consistent with the defendant having had no electric fires on February 16, 1944, when the bargain was struck as to the rent. In her cross-examination the defendant said: " I do not have any coal, I have electric " fires." This again appears to relate to the date of the hearing.

I think, therefore, that some part of the defendant's rent must be attributed to the carrying of coals, which is " attendance." I also think that some part of her rent must be attributed to the removal of refuse, and I feel difficulty in accepting the view of the learned Lord Chief Justice that " the removal of refuse is certainly as much to the advantage " of the landlord, who must be responsible for seeing that the " refuse from the flats is taken away and put out for the local " authority to collect." This would appear to be the tenant's responsibility. (See Public Health Act, 1936, s. 72.)

However, taking the most favourable view for the plaintiff in regard to these two matters and in regard to the calculation of the cost of these services, it is clear on the figures (which I need not set out in detail) that the portion of the rent of 175*l.* which is fairly attributable to these services cannot be more than the figure of 14*l.* put forward by the plaintiff. In fact, if I applied the method of calculation set out above, it would be less than 14*l.* However, I need not go further into that matter, for 14*l.* is not, to my mind, a substantial portion of the whole rent of 175*l.*

(1) [1922] 2 K. B. 647.
(2) [1923] 2 K. B. 185.

The result is that I agree with the conclusion of the learned Lord Chief Justice that the action must be dismissed, and it was not contended by Mr. Scott Henderson that, on this footing the order on the counterclaim was incorrect. This appeal must be dismissed with costs.

SOMERVELL L.J. I agree with the judgment that has just been delivered by Morton L.J., and only wish to add a few observations on one point, namely the deduction in respect of the landlord's own advantage.

This is not an easy conception to apply and turn into a proportion. Some forms of attendance would be solely, so far as I can foresee, for the tenant's advantage. For example, if the landlord provided someone to clean boots and shoes. There may, however, be matters which it is of advantage to the landlord to have under his control and to prohibit the tenants from doing for themselves. The removal of refuse which arises in the present case is an example. The landlord may feel it would not be to his interest, considered as landlord of the whole block, to have tenants or their domestic servants carrying down tins of refuse at all hours. He, therefore, prohibits them doing this and arranges for one of his staff to do it. A tenant might say he was perfectly willing to do this himself and did not wish to pay anything for having it done for him. The landlord, however, is saying (as he is entitled to do) : " If you want to " become my tenant, it is a condition that you should agree " to having this done for you and you must pay for it." Accepting, as I do fully, the construction placed by my brother Morton on " attendance," I think the statement he has quoted from the Master of the Rolls's judgment in *Engvall's* case (1) on the " landlord's advantage " comes to this. Where you find that what is prima facie attendance on the tenant is also of advantage to the landlord as landlord—in this class of case—of a whole block of flats, you are not to treat it for the purposes of the section as attendance on the tenant simpliciter. The attendant is serving the interests of two masters, and, in fixing the amount to be attributed to the attendance under the section, this should be taken into account. There are, of course, under the section a number of things which a landlord may provide over and above the unfurnished rooms, for the expense of which he will be recouped in the rent but which are disregarded in arriving at the proportion of the rent which has to be substantial if the premises are to be taken out of the Act. Central heating and the furnishing of the hall and staircase are examples which arise in the next case, *Property Holdings Company, Ld.* v. *Mischeff* (1). There is, therefore, no illogicality in treating as outside the section a proportion of the cost of "attendance" in circumstances such as those referred to above and dealt with in the passage cited from the judgment of the Master of the Rolls in *Engvall's* case (2).

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(1) [1945] 1 All E. R. 230, 234.

ASQUITH L.J. I would only add a sentence or two on a minor point which I think has not been dealt with in the judgment of my brethren. It might be urged (and I think it was) that among the services which qualify as "attendance" there should be reckoned that of the porter in accepting delivery (on the ground floor) of letters and parcels for the tenant. (See General Regulation 5.) These services were, no doubt, intended to be covered by the figure of 14*l*. If the tenant in question is provided with a goods lift in which such letters and parcels could be sent up to him or her, the service in question might qualify as "attendance." Even as to this I am doubtful, for "attendance" seems to me to imply not merely attending to some matter for the benefit of the tenant, but attendance *on* the tenant, through the physical presence of the alleged attendance in or immediately outside the flat in question (*Wood* v. *Carwardine* (3)). But, assuming the service in question to be "attendance" where a goods lift is provided, it cannot, in my view, be "attendance" where such a lift is not provided. Moreover, in the absence of a lift, it could, even if "attendance," be of no particular value to the tenant, who might well prefer to have his letters and parcels delivered at his flat upstairs by the postman, rather than to have to go to the ground floor to claim them from the porter. This is a minor supplementary reason in support of judgments with which in other respects I wholly concur.

Appeal dismissed.

Solicitors: *Griffinhoofe & Brewster; Lipton & Jefferies.*

(1) Post p. 645.
(2) [1945] 1 All E. R. 230, 234.
(3) [1923] 2 K. B. 185, 190.

H. C. G.

PROPERTY HOLDINGS CO., LD. *v.* MISCHEFF.

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July 16, 17, 30.

Morton, Somervell and Asquith L.JJ.

Landlord and Tenant—Rent Restriction—Dwelling-house let at rent including payment for use of furniture—Method of calculating part of rent attributable to furniture—" Substantial portion " of rent—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32) *s.* 10, *sub-s.* 1.

The defendant was the sub-tenant of a flat let by the plaintiffs in 1937 to one T., and sub-let by him to the defendant on June 26, 1942. The rent in both cases was 275*l.* a year, inclusive of 73*l.* rates. The head lease having come to an end the defendant claimed to be a statutory tenant by virtue of s. 15, sub-s. 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The plaintiffs claimed that the rent included payments in respect of attendance and furniture which formed a substantial portion of the rent, and that the premises were therefore not within the Rent Restriction Acts. The judge found that the capital value of the furniture was 200*l.*, and that fifteen per cent. of that, or 30*l.* was the part of the rent attributable to the furniture:—

Held (1.) that since there was no contractual right on the part of the tenant to such attendance as was in fact provided, the flat was not let at a rent which included payments in respect of attendance.

(2.) That it was, on the facts, let at a rent which included payments in respect of furniture.

(3.) That while the method might differ in different cases, a useful method of ascertaining the amount of rent to be attributed to the value of the furniture was to calculate the capital value of the furniture at the date when the lease (or sub-lease) was entered into, ignoring all subsequent fluctuations of value, and then to consider what percentage of that capital value should be regarded as the amount of rent fairly attributable to the furniture, taking into account such matters as the loss of interest by the landlord on his capital expenditure and the probability of depreciation, and any other matters which the court thinks it proper to take into account. The percentage allowed need not be the same for all the furniture, if some is more subject to depreciation than the rest.

(4.) That in considering the value to the tenant, it is prima facie of equal value to any tenant, and the burden is on the tenant to show that there are any special circumstances making the furniture of less value to him.

(5.) That rates ought not to be deducted from the gross rent in considering whether the figure arrived at is a " substantial portion " of the rent.

(6.) That on the facts of the present case assuming the rather high figure of fifteen per cent. (30*l.*), arrived at by the trial judge, to be correct, 30*l.* was not a " substantial portion " of 275*l.*, and the appeal must be allowed.

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Quaere, whether furniture outside the demised premises (e.g., in halls and passages) could be taken into account if there was a contractual right to the use of such furniture.

APPEAL from Henn-Collins J.

By a lease dated January 27, 1937, the plaintiffs, Property Holdings Co., Ld., demised to one, Major Eric Trevor, a flat, No. 19, Albion Gate, Hyde Park, London, W.2. together with the use of the following articles: (1.) linoleum in the three bedrooms, the kitchen and the maid's bathroom, and rubber floorcloth in the best bathroom and the lobby; (2.) a built-in kitchen cupboard, described in the evidence as follows: "It "is the ordinary cupboard for the purpose of keeping kitchen "equipment in, and built round it are various other cupboards, "going from floor to ceiling. It is a fairly comprehensive "piece of furniture"; (3.) a refrigerator; (4.) a fitted medicine chest in the bathroom; (5.) two mirrors fastened to the wall, one being in the principal bathroom and the other in the cloakroom. The term of the lease was for fourteen years, determinable as therein mentioned and the rent was 275*l.* a year. On June 26, 1942, with the written consent of the plaintiffs, Major Trevor sub-let the flat and the use of the articles already mentioned to the defendant, Mr. Kiril Mischeff, the rent being 275*l.* and the terms of the sub-lease being, in substance, identical with the terms of the head lease.

On September 29, 1944, the head lease came to an end in circumstances which it is unnecessary to describe. Thereupon the defendant claimed that he became a statutory tenant of the plaintiffs on the same terms as he held from Major Trevor. This claim was based on s. 15, sub-s. 3, of the Increase of Rent and Mortgage (Restrictions) Act, 1920 (1). On October 9, 1944, the plaintiffs issued the writ in this action claiming possession of the flat, and mesne profits from September 29, 1944. The plaintiffs alleged that although the rateable value of the flat was such as to bring it within the operation of the Rent Restriction Acts, it was taken out of the Acts by the operation of s. 3, sub-s. 2 (*b*) of the Act of 1939 and s. 10 of the Act of 1923. The joint effect of these sections (so far as material) was to exclude from the operation of the Acts any dwelling-house bona fide let at a rent which includes payments in respect of attendance or the use of furniture, provided that the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial part of the whole rent.

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(1) By s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "Where the interest of a tenant of "a dwelling-house to which this "Act applies is determined, either "as the result of an order or "judgment for possession or eject- "ment, or for any other reason, "any sub-tenant to whom the "premises or any part thereof "have been lawfully sub-let shall, "subject to the provisions of this "Act, be deemed to become the "tenant of the landlord on the "same terms as he would have "held from the tenant if the "tenancy had continued."

Henn-Collins J. held (*a*) that the flat was not bona fide let at a rent which included payments in respect of attendance; (*b*) that the flat was bona fide let at a rent which included payments in respect of the use of furniture; (*c*) that the amount of rent which was fairly attributable to the use of the furniture, regard being had to the value of the same to the tenant, formed a substantial portion of the whole rent. Accordingly he held that the flat was excluded from the operation of the Acts, and that the plaintiffs were entitled to possession and to mesne profits as claimed. The defendant appealed.

G. O. Slade K.C. and *Raeburn* for the defendant. In arriving at the proportion of the rent attributable to the use of the furniture Henn-Collins J. made several mistakes. First the comparison is with the "whole rent" and it was wrong therefore to make the comparison with the rent of the flat less the amount of the rates. Secondly, it was wrong to accept the assessment of the value of the furniture in 1942. It was put into the flat in 1937 when the flat was first let and furniture then was half the value that it became in 1942 and the capital value of the furniture should therefore have been taken as 100*l.* instead of 200*l.* Thirdly, there was no justification in taking so much as fifteen per cent. of the capital value as the annual sum attributable to the tenant having the use of the furniture. In any case 15*l.* as compared with 275*l.* cannot be called a substantial portion of the rent. The suggestion that a trifling part of the rent is sufficient to make the Rent Restriction Acts inapplicable ignores the word "substantial" first introduced by s. 10, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923 and made applicable to s. 3, sub-s. 2, of the Rent and Mortgage Interest Restrictions Act, 1939 by the First Schedule to that Act. It must be a comparison of figures and can it be said that fifteen per cent of the rent is

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substantial and any smaller percentage not substantial? The legislature would have made the matter much easier by fixing a percentage, but as it has failed to do, it would seem that it is for the court to do so. In any case it is contended that the cost of the use of the furniture is not a substantial part of the rent here, a rent which in the last six months of the tenancy was increased to 375*l.* so that this may be the proper rent to be taken into account. [They referred to *Gray* v. *Fidler* (1).]

Scott Henderson K.C. and *Raymond Stock* for the plaintiff. The estimation of whether the cost of the use of the furniture is a substantial part of the whole rent really only involves a guess, although in practice it comes down to being an arithmetical calculation. There is no justification for arriving at the value of the furniture in 1937 although as it happened the rent payable in 1942 was the same as that payable on the first letting in 1937. That is a mere coincidence. It is conceded that the whole rent of 275*l.* must be taken into account.

[MORTON L.J. Is not the relevant date the commencement of the head lease?]

We are not, strictly speaking, concerned with the head lease. The tenant might have sub-let only a part of the dwelling-house, and each part so sub-let would become a separate dwelling, and the question for consideration as regards furniture would be whether the portion of the rent of the sub-let portion attributable to furniture was substantial. Values may be changing and the proportion may be changing.

King v. *Millen* (2) was binding on Henn-Collins J. but is not binding on this court; it is submitted that it is wrong.

We rely both on attendance and furniture. Taking up hot water to a person is attending on him, and making hot water for him is attending on him, even though it is conveyed through pipes instead of carried by servants. Attendance does not depend on close personal proximity. The evidence was that the annual cost to the plaintiffs of services was approximately—porters, 10*l.* a flat; stokers, 10*l.* a flat; fuel, 20*l.* a flat; all those are cost of attendance. The judgment was right because 30*l.* was fairly attributable to furniture in the flat, and another 10*l.* to furniture in passages, etc. 40*l.* was attributable to attendance. Each is a substantial part of a rent of 275*l.*

Slade K.C. replied.

MORTON L.J. Asquith L.J. has asked me to say that he

(1) [1943] K. B. 694.

(2) [1922] 2 K. B. 647.

has read the judgment which I am about to deliver, that he agrees with it, and also the judgment to be delivered by Somervell L.J., and does not desire to add anything.

[After stating the facts and the findings of the learned judge, his Lordship continued :]

I agree with the learned judge's decision on (*a*) and (*b*), but I disagree with his decision on (*c*). The result is that, in my view, the flat does come within the operation of the Rent Restriction Acts, the defendant has continued in lawful possession thereof as a statutory tenant of the plaintiffs, and the action ought to have been dismissed.

In dealing with point (*a*), I can adopt to a large extent the language of the learned judge, as I entirely agree with his reasoning and with his conclusion. He said: "The "plaintiffs rely upon the fact that they provide both "attendance and furniture. The attendance is of four kinds— "the presence of hall porters, the removal of refuse, the "cleaning and servicing of the halls, stairways and passages "common to all tenants, and the provision of central heating "and constant hot water." The learned judge then said that the last two of these items had been held, by a decision binding upon him, not to constitute "attendance." He probably had in mind the cases of *King* v. *Millen* (1) and *Wood* v. *Carwardine* (2). He then proceeded : "Taking next "the presence of the hall porters, the plaintiffs undertake to "use every precaution to employ no one but a competent "and trustworthy person as resident porter, but beyond that "their obligation does not go. Though the porter may, and "no doubt does, make himself obliging to the tenants, he has "no duty to perform for them, and I do not think that such "attendance as he chooses to give can be said to be any part "of that for which the tenant pays his rent. Much the same "considerations apply to the removal of refuse. The receptacles are in practice removed from the back doors of the "flats by someone employed by the plaintiffs to the point of "collection by the local authority, but this service is not "stipulated for in the lease, and the tenant would have no "valid ground of complaint if he was left to make his own "arrangements for this to be done. I do not think "'attendance' can be extended to anything to which the "tenant is not contractually entitled. I take the same view "with regard to the servicing, including the lighting and

(1) [1922] 2 K. B. 647.

(2) [1923] 2 K. B. 185.

"heating, of the parts of the building common to all the "tenants. These do not, in my judgment, constitute attend-"ance within the meaning of the section." I entirely agree with this passage.

The learned judge then went on to point (*b*), and proceeded as follows: "That brings me to the use of the furniture. "This may be divided into two categories: that which "furnishes the parts of the building common to all tenants, "and things of which the tenant has the exclusive use within "the flat." He then held that the former category must be disregarded for the present purpose, and I agree with this view since the tenant had no contractual right to insist that the furniture in this category should be upon the premises. I express no concluded view upon the question whether the use of furniture in the hall and passages could be taken into account, if the tenant had such a contractual right, but I am inclined to think that the section is intended to refer only to furniture inside the "dwelling-house" which is let to the tenant, and this appears to have been the view of Scott L.J. in *Brown* v. *Robins* (1). The court did not, however, have to consider in that case the position in regard to furniture in a portion of the premises through which the tenant had a right to pass.

Henn-Collins J. then held that all the articles included in the sub-lease were "furniture" within the meaning of s. 10 of the Act of 1923. Here again I agree, in view of the decision of this court in *Gray* v. *Fidler* (2). In my view, the flat was bona fide let at a rent which included payments in respect of the use of furniture.

I must now state my views on this difficult question: When a flat is bona fide let at a rent which includes payments in respect of the use of furniture, how is a judge to ascertain "the amount of rent which is fairly attributable to the use "of the furniture?" The method may differ in different cases, but the folllowing seems to me a useful method. He should first consider what, upon the evidence, was the capital value, at the date when the lease was executed, of the furniture included in the demise. I do not think that any attention should be paid to any rise or fall in the value of the furniture after that date. In the present case the relevant date is, in my view, June 26, 1942, when the sub-lease was executed. It is by virtue of the sub-lease that the defendant claims now

(1) [1943] W. N. 93; 168 L. T. 340, 342.

(2) [1943] K. B. 694.

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to be a statutory tenant, and it was on that date that the rent was agreed between the defendant and Major Trevor. (See as to this my judgment just delivered in the case of *Palser* v. *Grinling* (1).) He should then consider what percentage of that capital value should be regarded as the amount of rent fairly attributable to the furniture, taking into account such matters as the loss of interest by the landlord on his capital expenditure and the probability of depreciation and any other matters which he thinks it proper to take into account.

In *Maddox Properties, Ld.* v. *Klass* (2) Denning J. said: "I have had estimates given to me of its value on each side, "and I think, on the whole, that twenty per cent. of the value "of the ordinary furniture is quite a fair basis to assess rent "for furniture, ten per cent. for the fixed cupboards, and "fifteen per cent. for the refrigerator and cooker." I entirely agree with that learned judge's view that all furniture should not be assessed on the same basis. One can well imagine that such articles as chairs are liable to much greater depreciation than such articles as, for instance, a cupboard which is fitted into a space in the wall. The figures arrived at by him seem to me high, but were no doubt justified on the evidence before him.

Next, the judge must have regard to "the value of the "same to the tenant." These words raise difficult questions in some cases. In my view, if a dwelling-house is bona fide let to any tenant at a rent which includes payments in respect of certain articles of furniture, then prima facie those articles are of the same value to that tenant as they would be to any other tenant, and the burden lies on the tenant to show that by reason of some special circumstances those articles should be treated as being worth less to him than they would be to any other tenant. (Compare my judgment in *Palser* v. *Grinling* (1).) No such circumstances were proved in the present case.

Henn-Collins J., after expressing the view that the articles in question in the case were "furniture," continued: "The "cost of them to-day is somewhere about 200*l*." I think that the learned judge must have intended to say: "The "value of them in 1942 was somewhere about 200*l*." The evidence in the case was directed, and rightly directed, to the value of the furniture in 1942, the date of the sub-lease to the

(1) Ante p. 631.

(2) [1946] 1 All E. R. 487.

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defendant, and I think the learned judge was accepting in substance the evidence so given. I accept his figure of 200*l.* The learned judge then continued: "I find that fifteen per "cent on that sum, namely, 30*l.* per annum, is fairly attributable to the use of them and of that value to the tenant (*sic*). "Of the total rent of 275*l.*, 73*l.* is attributable to rates, leaving "202*l.* as rent for the premises and furniture. Is 30*l.* a substantial proportion of 202*l.*? I think it is, and I therefore "hold that the premises in question are not controlled. It "follows that the plaintiffs are entitled to possession and "to mesne profits as claimed." I cannot agree with this conclusion. In the first place, I think that fifteen per cent. is rather a high percentage for furniture of this type; it may be, however, that the learned judge felt bound to accept this figure on the evidence. In the second place, I do not think that the learned judge was right in deducting the 73*l.* rates paid by the landlord. Thirdly, even if fifteen per cent. is the correct figure, in my judgment 30*l.* is not a "substantial portion" of a rent of 275*l.* within the meaning of s. 10. As to the last two points, see my judgment just delivered in the case of *Palser* v. *Grinling* (1).

The result is that the appeal must be allowed, and the action dismissed.

SOMERVELL L.J.: I agree with the judgment of Morton L.J. I only wish to add this. The procedure which he has suggested the judge should follow is, as it seems to me, wholly right on evidence such as that in this case. I can imagine circumstances in which it might be sought to show by evidence that the landlord ought not to be assumed to be getting the full economic return for the furniture in the premises. I do not think my brother intended to exclude the possibility of such evidence, and, with this footnote, I entirely agree with everything he has said.

Appeal allowed.

Solicitors for defendant: *J. M. Menassé & Co.*
Solicitors for plaintiffs: *Markby, Stewart & Wadesons.*

J. W. H.

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(1) Ante p. 631.

END OF VOL. AND OF KING'S BENCH SERIES FOR 1946.

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2. —— *Construction of lease — Lease for period of national emergency—" Declaration " by the Government " — Notice to quit — Validity—Notice addressed to directors of limited company—Validation of War-Time Leases Act,* 1944 (7 & 8 *Geo.* 6, *c.* 34), *s.* 1, *sub-ss.* 1, 2; *s.* 2, *sub-ss.* 1, 2—*Tenancy*

LANDLORD AND TENANT—*continued.*

Agreements (End of the War in Europe) Order, 1945 (*St. R. & O.* 1945, *No.* 793).
HAWTREY *v.* BEAUFRONT, LD.
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3. —— *Lease for two years "and then "quarterly"—Determination by three calendar months' notice expiring on any quarter day—Three calendar months' notice given before expiration of two years period—Construction.*
BRITISH IRON AND STEEL CORPORATION, LD. *v.* MALPERN - - - - **Lewis J. 171**

4. —— *Notice to quit — "On or before" a fixed date—Validity.*
DAGGER *v.* SHEPHERD - **C. A. 215**

5. —— *Notice to quit — Four-weekly tenancy—Notice not expiring at end of period —Notice given by landlord's husband—Not given in name of landlord—Notice invalid.*
LEMON *v.* LARDEUR - - **C. A. 613**

6. —— *Rent restrictions—Flat—Standard rent — Apportionment of rent charges for flat with another flat and shop—Whether both containing and contained premises must be within the Rent and Rent Restrictions Acts—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1290 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 *and* 3.
UPSONS, LD. *v.* HERNE - **C. A. 591**

7. —— *Rent restriction — Dwelling-house —Contractual and statutory tenant employed by landlord—Death of tenant—Succession to tenancy by son—Not in employment of landlord—Possession required by landlord for occupation by employee—Son's tenancy subject to defeasance—Landlord's right to possession—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*a*), *sch. I., para.* 1 (*g*), (i.).
BOLSOVER COLLIERY CO., LD. *v.* ABBOTT
C. A. 8

8. —— *Rent restriction — Dwelling-house let at rent including payment for use of furniture—Method of calculating part of rent attributable to furniture — "Substantial "portion" of rent—Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1.
PROPERTY HOLDINGS CO., LD. *v.* MISCHEFF - - - - **C. A. 645**

9. —— *Rent restriction — Claim for possession — "Suitable alternative accom-"modation" — Single dwelling-house — Rent and Mortgage Interest Restrictions (Amendment) Act,* 1923 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 3.
SHEEHAN *v.* CUTLER - - **C. A. 339**

LANDLORD AND TENANT—*continued.*

10. —— *Rent restriction — Death of common law tenant — Executrix and sole beneficiary residing in dwelling-house—Notice to quit—Right to statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*f*).
LAWRANCE *v.* HARTWELL - **C. A. 553**

11. —— *Rent restriction — Landlord's claim for possession — "Required . . . . for "occupation as a residence for some person "engaged in [landlord's] whole-time employ-"ment" — Material date — Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*a*) ; *sch. I.* (*g*).
BENNINGA (MITCHAM), LIMITED *v.* BIJSTRA
C. A. 58

12. —— *Rent restriction — Flat let at rent including payments in respect of attendance—Whether "substantial portion of whole rent"—Method of ascertainment—Rent & Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5 *c.* 32) *s.* 10, *sub-s.* 1—*Rent & Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*) *and sch. I.*
PALSER *v.* GRINLING - - **C. A. 631**

13. —— *See also* COUNTY COURT, ECCLESIASTICAL LAW, EMERGENCY LEGISLATION.

LICENSING (INTOXICATING LIQUORS)—*Licensed premises owned and occupied by company—Secretary of company and manager of premises, joint licensees—"Person who shall ". . . . keep . . . . any house . . . . of "public resort . . . . wherein . . . . liquors ". . . . shall be sold . . . . and who shall ". . . . knowingly permit . . . . disorderly "conduct" — "Keep" — No knowledge in fact of disorderly conduct by secretary — Delegation of duty by secretary to co-licensee —Conviction of secretary — Metropolitan Police Act,* 1839 (2 & 3 *Vict., c.* 47), *s.* 44.
LINNETT *v.* COMMISSIONER OF METROPOLITAN POLICE - - - **Divl. Ct. 290**

2. —— *See also* APPEAL.

LIEN — *Motor car — Hire purchase agreement—Hirer in default—Agreement duly terminated by owners—Car subsequently left by hirer at defendants' garage for repairs—Artificer's lien claimed by defendants—Interpleader issue.*
BOWMAKER, LIMITED *v.* WYCOMBE MOTORS, LIMITED - - - - **Divl. Ct. 505**

LIMITATION — *Motor-car — Collision — Injury to passenger — Drivers of car joint tortfeasors—Judgment against owners and driver of one vehicle—Negligent act of other driver done in execution of public duty—*

LIMITATION—*continued.*

Third-party proceedings — Contribution — Expiration of statutory period—Cause of action — Date of accruing—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6, sub-s. 1 (c)—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 1, sub-s. 1.
MERLIHAN *v.* A. C. POPE, LD. AND J. W. HIBBERT PAGNELLO (THIRD PARTY) **Birkett J. 166**

2. —— *Public authorities' protection—Commercial cargo in requisitioned ship—Loading and unloading by officers of Crown—Execution of public duty or authority—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21, sub-s. 1.*
WESTERN INDIA MATCH CO., LD. *v.* LOCK AND OTHERS **Lord Goddard C.J. 601**

LOCAL GOVERNMENT — *County council — By-law prohibiting betting — Validity — Repugnancy to general law — Street Betting Act, 1906 (6 Edw. 7, c. 43), s. 1, sub-s. 1, 4; s. 2—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58), s. 2, sub-s. 1.*
POWELL *v.* MAY - - **Divl. Ct. 330**

2. —— *House occupied by persons of the working classes—House let as two flats to two separate tenants—House unfit for human habitation—Person having control of house—Service of notice by local authority to execute certain specified works—Non-compliance with notice—Execution of works by local authority—Demand for payment of expenses thereby incurred—Validity of notice and demands—Contention that house was two separate dwellings—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), s. 9, sub-s. 1; s. 10, sub-ss. 1 and 3; s. 15, sub-ss. 1 and 5.*
BENABO *v.* WOOD GREEN BOROUGH COUNCIL - - - **Divl. Ct. 38**

3. —— *Planning scheme — Interim development order — Prohibition of use of wall of house for advertising — Validity — Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48), s. 47—Town and Country Planning (Interim Development) Act, 1943 (6 & 7 Geo. 6, c. 29), s. 5.*
MILLS & ROCKLEYS, LD. *v.* LEICESTER CITY COUNCIL - - - **Divl. Ct. 315**

4. —— *See also* HOUSING, MUNICIPAL CORPORATION.

LOTTERY — *Private lottery — Breach of conditions in Statute — Printing tickets for use in lottery—Failure of printer to print names and address of promoters on ticket—Whether printer liable for taking part in unlawful lottery—Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58), ss. 22, 24.*
STACEY *v.* WILKINS - **Divl. Ct. 271**

MASTER AND SERVANT — *Employment to act at theatre — Rehearsal — Clothing stolen from dressing room — Negligence — No duty on master to protect servant's clothing from theft.*
DEYONG *v.* SHENBURN - **C. A. 227**

2. —— *Liability of sub-contractor for injury to servant — Repairs to ship — Faulty staging — Breach of statutory duty by contractor — Sub-contractor not liable at common law—Shipbuilding Regulations, 1931 (St. R. & O. 1931, No. 133), reg. 11 (b).*
HODGSON *v.* BRITISH ARC WELDING CO., LD. AND B. & N. GREEN & SILLEY WEIR, LD. - - - **Hilbery J. 302**

3. —— *See also* EMERGENCY LEGISLATION.

MONEYLENDERS — *Memorandum of contract — Collateral security — Post-dated cheques for payment of principal and interest—Cheques given for interest not referred to in memorandum—Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6, sub-s. 2.*
KENT TRUST, LD. *v.* COHEN **C. A. 584**

MOTOR VEHICLE. *See* HIGHWAY, JUSTICES, LIEN.

MUNICIPAL CORPORATION — *Election of borough councillor — Nomination paper—"Validly nominated"—Duty of mayor to decide—Nomination pronounced invalid on ground of disqualification to sit—Jurisdiction —Local Government Act, 1933 (23 & 24 Geo. 5, c. 51), sch. II., para. 5 (1.).*
WATSON AND OTHERS *v.* AYTON **Hallett J. 297**

NATIONAL SAVINGS CERTIFICATES — *Dispute as to ownership between rival claimants —County Court proceedings — Postmaster-General not a party—Jurisdiction—Whether claim referable to Chief Registrar of Friendly Societies—Savings Certificates Regulations, 1933 (St. R. & O. 1933, 449), reg. 27.*
WINTER *v.* WINTER - - **C. A. 466**

NEGLIGENCE — *Personal injury — Contributory negligence—Duty of person riding or driving at night.*
MORRIS *v.* LUTON CORPORATION **C. A. 114**

2. —— *See also* LIMITATION, MASTER AND SERVANT.

NUISANCE — *Shopkeeper — Sale of food in short supply —Small quantity only sold to each customer— Queues of customers on highway extending in front of neighbouring shops—Alleged loss of custom at those shops—Quantum and duration of queues—Shopkeeper doing nothing unreasonable or unnecessary.*
DWYER AND ANOTHER *v.* MANSFIELD **Atkinson J. 437**

PENSION — *Member of military forces — Attributability of injury or disease to war service — Evidence — Principles applicable — Royal Warrant, December,* 1943, *art.* 4 (2.) (3.).
Starr *v.* The Minister of Pensions. Nuttall *v.* The Same. Bourne *v.* The Same - - - - **Denning J. 345**

2. —— *Pensions appeal tribunal — "War "injury" — "Injurious act" — Air raid warning — Black-out in factory — Worker in factory injured in going to shelter—Injury caused by falling over bag of steel material—Personal Injuries (Emergency Provisions) Act* (2 & 3 *Geo.* 6, *c.* 82), *s.* 8, *sub-s.* 1.
Minister of Pensions *v.* Ffrench **Denning J. 260**

3. —— *War service — Non-attributable disease — Aggravation — "And remains "aggravated" — Appeal — Functions of Minister and Appeal Tribunal — Pensions Appeal Tribunals Act,* 1943 (6 & 7 *Geo.* 6, *c.* 39), *s.* 1—*Royal Warrant of December,* 1943, *Art.* 4 (1.).
Shipp *v.* Minister of Pensions. Minister of Pensions *v.* Pretty **Denning J. 386**

PRINCIPAL AND SURETY. *See* Bank.

QUARTER SESSIONS. *See* Appeal.

RAILWAY — *Level crossing — Accommodation crossing—Duty of railway company to persons using such crossing—Negligence.*
Liddiatt *v.* Great Western Railway Company - - - - **C. A. 545**

2. —— *Unused half of return-ticket—Transfer by wife to husband—Use by husband —Absence of intent to defraud—Regulation of Railways Act,* 1889 (52 & 53 *Vict., c.* 57), *s.* 5, *sub-s.* 3.
Browning *v.* Floyd **Divl. Ct. 597**

3. —— *See also* Rating.

RATING — *Agricultural cottage — Restrictions on use and on weekly sum recoverable by occupier—Principle of valuation — Agricultural Wages (Regulation) Act,* 1924 (14 & 15 *Geo.* 5, *c.* 37)—*Agricultural Wages (Regulation) Amendment Act,* 1940 (3 & 4 *Geo.* 6, *c.* 17)—*Local Government Act,* 1929 (19 & 20 *Geo.* 5, *c.* 17), *s.* 72.
Bomford *v.* South Worcestershire Assessment Committee and Others **Divl. Ct. 452**

2. —— *Gas undertaking — Hereditaments in several rating areas—Profits basis—Tenant's remuneration — Tenant's capital — Uninvested balances of benevolent funds used in undertaking not to be deducted.*
Croydon Gas Company *v.* Croydon County Borough Rating Authority **Divl. Ct. 380**

RATING—*continued.*

3. —— *Railway — Canteen — Occupation—Provision of canteen by railway company—Presence of caterers by agreement with railway company, to supply railway employees with hot meals and refreshments—" Railway hereditament "—Premises not so let out to caterers as to be capable of separate assessment —Railways (Valuation for Rating) Act,* 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.
In the Matter of the London and North Eastern Railway Company (Canteens) **Ry. and C. Com. 13**

4. —— *Railways — Timber-stacking yards vacant during war—" Occupied " — Railway hereditaments—Entry in railway valaution roll—Rateability of railway company as owners—Railways (Valuation for Rating) Act,* 1930 (20 & 21 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 3.
London & North Eastern Railway Company *v.* Railway Assessment Authority **Ry. and C. Com. 27**

5. —— *Valuation list — Indefinite postponement of new valuation list—Proposal to amend gross and rateable value of a property—Proposal approved—One of many proposals in rating area—Supposed general rise in values—Valuations over whole area intended with view to proposals for amendment—Validity—Rating and Valuation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 90), *ss.* 19, 37—*Rating and Valuation (Postponement of Valuations) Act,* 1938 (1 & 2 *Geo.* 6, *c.* 19), *s.* 1—*Rating and Valuation (Postponement of Valuations) Act,* 1940 (3 & 4 *Geo.* 6, *c.* 40), *s.* 11, *sub-s.* 3.
Pratt *v.* North-West Norfolk Assessment Committee - - - **C. A. 93**

REGISTRATION. *See* Business Name, Trade Union.

RENT RESTRICTION. *See* Landlord and Tenant.

REVENUE — *Income tax — Assessment — Trade debt — Deduction from profits as bad debt — Subsequent payment in respect of debt — Inclusion as trading receipt in year paid—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D., Cases I. & II., r.* 3 (i.).
Bristow (H.M. Inspector of Taxes) *v.* William Dickinson & Co., Ld. **C. A. 321**

2. —— *Income tax — Deduction — Separation deed between husband and wife — Provision for annual payments to wife—Some payments made without deduction of tax—Arrears—Extent of husband's right to deduct tax—Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19, *sub-r.* 1.
Hemsworth *v.* Hemsworth **Denning J. 431**

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3. —— *Income tax—Exemption to charities—Body "established for charitable purposes "only"—Abolition of vivisection—Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37.
COMMISSIONERS OF INLAND REVENUE *v.* NATIONAL ANTI-VIVISECTION SOCIETY **C. A. 185**

ROAD TRAFFIC. *See* HIGHWAY, JUSTICES.

SHOPS — *Sale of food — Sunday trading — Sale of bread—No "partial exemption" order — "Meals or refreshments" — Shops (Sunday Trading Restrictions) Act*, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 53), *s.* 1; *sch. I., para.* 1 (*b*); *sch. II.* (*a*).
BINNS *v.* WARDALE - - **Divl. Ct. 451**

TRADE UNION — *Registered name — Right to sue in tort—Right to sue for libel—Trade Union Act*, 1871 (34 & 35 *Vict.*, *c.* 31)—*Trade Union Amendment Act*, 1876 (39 & 40 *Vict.*, *c.* 22).
NATIONAL UNION OF GENERAL AND MUNICIPAL WORKERS *v.* GILLIAN AND OTHERS **C. A. 81**

TRESPASS TO LAND — *Oral agreement for tenancy—No memorandum to satisfy statute—Clandestine entry into possession by tenant—Forcible ejectment by owner—Right of tenant to sue owner for damages—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 40.
DELANEY *v.* T. P. SMITH, LD. **C. A. 393**

VENDOR AND PURCHASER — *Sale with "vacant possession" — Rubbish in cellars making them unusable — Consequent failure to give vacant possession—Damages.*
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WORKMEN'S COMPENSATION — *Injury to workman—Alternative remedies—Receipt of weekly payments as compensation—Without knowledge of option to claim damages at common law—Claim not barred—Workmen's Compensation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 29, *sub-s.* 1.
LEATHLEY *v.* JOHN FOWLER & CO., LD. **C. A. 579**

2. —— *Injury by accident—"Arising out "of" the employment—Epileptic—Agricultural worker—Fall into furrow full of water—Death by drowning—Workmen's Compensation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-s.* 1.
WILSON *v.* CHATTERTON **C. A. 360**

HOUSING — *Compulsory purchase — Land to be acquired needed for convenience of houses in different ownership—Whether land exempt from acquisition—Meaning of "house"—Housing Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *s.* 75.

2. —— *Compulsory purchase of land—Notice of objection—Duty of Minister—Matters to be taken into consideration—Objector not entitled to implement notice in all cases.*

3. —— *Compulsory purchase order — Landowner's grounds of objection — Detailed reply by local authority without landowner's knowledge — Minister's duty to act judicially —Housing Act*, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51).

LANDLORD AND TENANT — *Rent restriction — Dwelling-house let at rent including payment for use of furniture—Method of calculating part of rent attributable to furniture —"Substantial portion" of rent—Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1.

2. —— *Notice to quit — Four-weekly tenancy—Notice not expiring at end of period—Notice given by landlord's husband—Not given in name of landlord—Notice invalid.*

3. —— *Rent restrictions — Flat — Standard rent — Apportionment of rent charges for flat with another flat and shop—Whether both containing and contained premises must be within the Rent Restrictions Acts—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 *and* 3.

LANDLORD AND TENANT—*continued.*

4. —— *Rent restriction — Flat let at rent including payments in respect of attendance—Whether "substantial portion of whole rent"—Method of ascertainment—Rent & Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 10, *sub-s.* 1—*Rent & Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 2 (*b*) *and sch. I.*

LIMITATION — *Public authorities' protection —Commercial cargo in requisitioned ship—Loading and unloading by officers of Crown—Execution of public duty or authority—Limitation Act*, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 21, *sub-s.* 1.

MONEYLENDERS — *Memorandum of contract — Collateral security — Post-dated cheques for payment of principal and interest—Cheques given for interest not referred to in memorandum—Moneylenders Act*, 1927 (17 & 18 *Geo.* 5, *c.* 21) *s.* 6, *sub-s.* 2.

RAILWAYS — *Unused half of return-ticket—Transfer by wife to husband—Use by husband —Absence of intent to defraud—Regulation of Railways Act*, 1889 (52 & 53 *Vict.*, *c.* 57), *s.* 5, *sub-s.* (3).